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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 476

JOHN ELMER WOODARDS,
Petitioner,

v.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. _____.

JOHN ELMER WOODARDS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in this cause on March 30, 1966, affirming his conviction of first degree murder without recommendation of mercy.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the Court of Appeals of the Ninth Judicial District of Ohio is unreported and is printed in Appendix A, *infra,* p. 18a.

The opinion of the Supreme Court of Ohio which affirmed the conviction, printed in Appendix A, *infra,* p. 1a, is reported at 6 Ohio St. 2d 14, 215 N. E. 2d 568 (1966). The judgment of the Supreme Court of Ohio is printed in Appendix A at page 30.

JURISDICTION.

The judgment of the Supreme Court of the State of Ohio was entered on March 30, 1966. Upon petitioner's timely application, the time within which petition for certiorari might be filed was extended by this Court from June 28, 1966 until August 25, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

I. Does the mandatory imposition of the death penalty upon the petitioner as a consequence of a state conviction of murder in the first degree without a recommendation of mercy violate the Eighth and Fourteenth Amendments to the United States Constitution?

II. In a state prosecution for murder in the first degree where the petitioner has interposed the defense of insanity, is the trial court's limitation of the proof and the consideration of the jury in determining the insanity of petitioner to whether the accused had both (a) insufficient mental power to determine right from wrong and (b) a lack of will power to accept the right and reject the wrong, an arbitrary, capricious, and fundamentally unfair test of criminal responsibility, in the light of present medical and psychiatric knowledge and, consequently, a denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution?

III. Did the arresting officer, whose only basis for a warrantless arrest and search of the residence of the accused was (1) knowledge that the assailant must have been known to the murder victim since there was no sign of forcible entry of the home of the deceased, (2) knowl-

edge that the accused was known to the victim, having been a previous tenant in her upstairs apartment, (3) knowledge that the accused had left owing back rent and had done some damage to the premises, (4) knowledge that about two months earlier, an attempt to serve an assault and battery warrant upon the accused in connection with another matter had failed because the accused was out of state at that time, and (5) knowledge that about one and one half years earlier another officer had questioned (but not charged) the accused in connection with several burglaries, have probable cause to arrest the accused and search his home within the requirements of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

IV. In the absence of an emergency, and where the police had ample opportunity to procure an arrest and search warrant but failed to do so, is a warrantless arrest and search of the home of the accused *per se* unlawful and unreasonable within the meaning of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

V. Was a warrantless search of the entire premises of the petitioner incident to an arrest of the petitioner outside his residence?

VI. Was a warrantless search of the entire premises of the petitioner a broad, general and roving search in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

VII. Was the seizure of blood-stained clothing from the home of the petitioner a seizure of evidentiary matter only, so that, whether or not the search which produced it was reasonable, the seizure violated the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

VIII. Was the illegality of the arrest, search and seizure cured by the consent of anyone authorized to waive the constitutional rights of petitioner?

IX. Where the accused, an emotionally disturbed 24 year old man of low-normal intelligence who completed the eighth grade with difficulty, and whose ability to comprehend was disproportionately low, was arrested and held in solitary confinement for three days, during which time he was interrogated in relays by police officers for several intervals, including one of approximately five hours in length, where the accused denied participation in the murder with which he was ultimately charged at the outset of the interrogation, and neither requested nor was advised of his right to counsel until after his confession had been obtained, should confessions so obtained have been suppressed as violative of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

X. Where the accused was arrested without a warrant and without probable cause to arrest, and where, during his detention pursuant to such arrest, the accused was subjected to police interrogation which resulted in a confession by the accused, should such a confession obtained by reason of such illegal arrest and detention be suppressed in state criminal proceedings as violative of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution?

XI. Where the accused, an emotionally disturbed 24 year old man of low-normal intelligence who had completed the eighth grade with difficulty and whose ability to comprehend was disproportionately low, was arrested and held in solitary confinement for three days, where he was interrogated at intervals during the period of his confinement by police officers in the absence of counsel and where, during the course of such interrogation the interro-

gating officers, in an effort to induce a confession, confronted the accused with articles of blood-stained clothing illegally seized from his home, should confessions so obtained have been suppressed as violative of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

XII. Where the accused, an emotionally disturbed 24 year old man of low-normal intelligence who had completed the eighth grade with difficulty and whose ability to comprehend was disproportionately low, was arrested and held in solitary confinement for three days, during which time he was interrogated at intervals by police officers in relays, where one of the intervals of interrogation was of approximately five hours duration, where the accused at the outset of the interrogation denied participation in the murder with which he was ultimately charged, where, during the course of the interrogation the accused neither requested nor was advised of his right to counsel, and the accused was not brought before a magistrate upon a charge until the fourth day after his arrest, and then only after a full confession had been elicited from him, even though the accused could reasonably have been charged and brought before a magistrate considerably earlier and before the accused confessed to the murder with which he was ultimately charged, should a confession obtained by reason of such delay in arraignment be suppressed in state criminal proceedings as violative of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

XIII. Has petitioner understandingly, knowingly and deliberately waived his federal constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution by failing to move to suppress evidence in advance of trial, or by any other conduct during the course of the trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States.

Amendment XIV, Section 1, Clause 2:

"* * * nor shall any State deprive any person of life, liberty, or property without due process of law * * *."

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Statutes.

The full text of each of Ohio Revised Code Sections 2321.03, 2505.21, 2901.01, 2935.05, 2935.07 and 2935.14 and Rule 5(a), Federal Rules of Criminal Procedure is reprinted in Appendix B, *infra*, pp. 31a-34a.

STATEMENT.

Petitioner was indicted, tried and convicted of first degree murder in the Common Pleas Court of Lorain County (R. 1117, 1156). The trial commenced on January 20, 1964 (R. 6) and on January 31, 1964, the jury returned a verdict of guilty, without a recommendation of mercy (R. 1156). When such a verdict is returned in Ohio, the death penalty is mandatory. Ohio Revised Code, Sec. 2901.01.

On the morning of July 13, 1963, Margaret Van Arsdale, a woman 85 years of age, was discovered dead in her home by a neighbor (R. 29). Subsequent autopsy revealed a crushing injury to the chest, ruptured spleen, lacerations of the vaginal wall and multiple hemorrhages and fractures throughout her body (R. 137-140).

About 11:00 a.m. that morning, a sheriff's deputy arrived at the scene in response to the neighbor's telephone call (R. 274). About 15 minutes later, two other deputies arrived (R. 280) and within a few minutes thereafter, other deputies and a police lieutenant arrived at the decedent's residence (R. 311). The officer in charge of the investigation, Deputy Ondreyco, arrived on the scene at 11:48 a.m. (R. 426). After an investigation of the premises, conversations with the deputies and the neighbors, Ondreyco instructed a deputy to arrest the petitioner (R. 434). The information he had at that time which, in his judgment implicated petitioner in the death of the decedent, was limited to the following facts: (1) the assailant must have been known to the decedent because there was no sign of forcible entry of the premises (R. 435); (2) petitioner and his wife had been tenants of the decedent, and had left the premises in a damaged condition and owing back rent (R. 434); (3) one of the deputies had tried (unsuccessfully because petitioner was out of the state

at the time) to serve an assault and battery warrant upon petitioner about two or three months earlier (R. 435); and (4) about a year and one-half earlier, another deputy had questioned petitioner in connection with several burglaries, offenses with which he was never charged (R. 435).

At about 11:50 a.m., the deputy drove to the home of petitioner's mother-in-law to inquire as to the whereabouts of petitioner (R. 584). He remained about ten minutes, found only the small brother-in-law of petitioner, a boy about eight years old, at home (R. 585), told him that petitioner had been in "a terrible car accident" (R. 801) and took him along to the petitioner's residence, about three miles away (R. 585). The boy showed the deputy the location of the house and about 12:20 p.m., the deputy's unmarked car and a police cruiser containing two other deputies converged on petitioner's house (R. 586). Both cars pulled into the driveway, the boy went to the door and found no one at home (R. 586). The deputy then asked the boy if he had ever entered the house when the occupants were not at home (R. 587). Upon the boy's affirmative reply, the deputy and the boy entered the home (R. 587). The law enforcement authorities had neither an arrest nor search warrant (R. 587), but the deputy searched the house "to see if John [petitioner] was there" and failing to find him, seized a pair of petitioner's boots which he found in petitioner's bedroom (R. 587).

The deputy and the other law enforcement authorities then waited until petitioner returned home (R. 587). After a wait of approximately 25 minutes, petitioner and his wife, who had been marketing, drove into the driveway of their home and stopped their automobile directly behind the deputy's unmarked car, near the clearly identifiable and visible police cruiser (R. 588). As soon as petitioner stepped out of the car, the deputy placed him under

arrest in connection with a fictitious service station robbery. He told petitioner that he had a witness who had observed the robber, that petitioner fit the description of the witness and asked him what he had worn the previous evening (R. 588). Petitioner and the deputy re-entered the house, petitioner pointed out the clothing he had worn, a pair of levis and a pink shirt, in a bedroom (R. 590) and the deputy seized the articles. Later the same afternoon, after petitioner was in jail, the deputy, still without a search warrant, came back to petitioner's house, was granted entry by petitioner's wife, announced that he would have to take more of petitioner's clothing, proceeded to the bedroom and seized another pair of levis, a pair of socks, a pair of shorts (R. 591-592) and a blood-stained handkerchief (R. 601-602). At no time did he ask or obtain the consent of petitioner's wife to remove the specific articles of clothing from the premises (R. 601). All of the clothing seized was ultimately turned over to the Cleveland Police laboratory for scientific analysis (R. 453-454) and bloodstains on the clothing were verified (R. 552-553).

Petitioner remained in custody at the county jail without formal charge from about 2:00 p.m. on July 13, 1963 (R. 436), until about 6:15 p.m. on July 15, 1963. During this period, petitioner was held incommunicado (R. 330-331), questioned in relays by interrogating officers for periods up to "a little more than five hours" at a time (R. 412), and charged with first degree murder immediately and only after he had confessed and re-enacted the murder at the scene (R. 409). Petitioner had denied implication in the murder from the time of his arrest at least until 1:15 p.m. on July 15, 1963 (R. 317-318).

During the course of the interrogation which resulted in petitioner's confession, petitioner was never advised

of his right to counsel (R. 453) because, in one of the interrogating officers' words, "he was innocent at that time" (R. 453), even though petitioner had been accused of complicity in the murder by his interrogators from the very outset of the interrogation (R. 288). Moreover, at the critical moments of the interrogation shortly before the petitioner's confession, petitioner was confronted with the blood-stained clothing seized from his house (R. 483-485, 884).

During the course of the interrogation, the chief interrogation officer, in an obvious attempt to break down the resistance of the accused (R. 445-446), read to him from a book on legal medicine on the subject of sexual perversion and excessive sexual desire and indulgence by elderly men and women (R. 443-444).[1] The officer then explained what he had read in simple language in order to help petitioner understand it. While the officer was defensive in his testimony as to his purpose in reading and explaining this subject matter to petitioner (R. 444-445), it is apparent that he was trying to induce the peti-

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[1] The exact language read and explained to petitioner is set out below:

"* * * Page 608, Sexual Perversions.

"Excessive sexual desire is known as satyriasis, when it occurs in men and nymphomania when it occurs in women. It consists in an abnormal indulgence in sexual intercourse whenever possible and is generally the expression of an advanced compulsion neurosis. The condition may occur in persons of any age. Occasionally, precocious sexual development and practices are found in male and female children below the age of ten; and such individuals are a serious problem inasmuch as they corrupt other children. Elderly people, both male and female, sometimes lose their normal inhibitions, lapse into a libidinous state and commit many sexual transgressions. Most of them are cases of senile dementia and are especially troublesome because they try to pervert children or practice exhibitionism and for this reason run afoul of the law" (R. 444).

tioner to admit sexual relations with the decedent by claiming that she was the aggressor, a defense which ultimately was actually interposed at the trial. Neither his wife nor his parents were permitted to see the petitioner from the time of his arrest until after his confession (R. 780, 805). Petitioner's father visited the jail for this purpose as soon as petitioner was in custody, and was turned away (R. 780) and petitioner's wife telephoned the jail, and spoke to the interrogating officers, who gave non-committal, evasive replies to her questions (R. 805). Petitioner was first allowed to telephone his wife immediately after his confession was obtained by the interrogating officers (R. 806).

July 15, 1963 was a normal working day for the court and there is no evidence that petitioner, but for the desire of the deputies to interrogate him, could not have been charged and arraigned before noon on that date.

Instead, at about 6:15 p.m. on July 15, 1963, one of the deputies took petitioner to the Elyria Municipal Court after hours to charge him with first degree murder (R. 409) and, represented by counsel for the first time, he was arraigned the next day, waived preliminary hearing and was bound over to the grand jury (R. 410).

An indictment for first degree murder was subsequently returned by the Grand Jury (R. 1117), to which petitioner entered pleas of not guilty and not guilty by reason of insanity (R. 1117).

At the trial, the theory of the prosecution was that the decedent had been murdered during the perpetration of rape. The defense, without denying that petitioner had been present in the decedent's home at the time of her death, urged that her death was accidentally caused by the accused when he was in such a drunken condition that he could not have formulated the necessary criminal

intent, and that his acts resulted from the uncontrollable impulse of a diseased mind.

During the prosecution's case, the blood-stained clothing was offered by the prosecution and received in evidence over the objection of the defense (R. 479, 485). Although the prosecution never offered a signed written confession in evidence, testimony as to petitioner's oral confession, contradictory to the theory of the defense, was offered during its case in chief by several prosecution witnesses, over defense objection (R. 298, 322, 385-408).

At the trial, psychiatric testimony was presented by two expert witnesses, one for the prosecution (R. 889) and one for the defense (R. 687). All of the expert testimony (R. 707, 713, 894), the final arguments of counsel (R. 1014, 1051) and the charge to the jury by the trial court (R. 1131-1132) were framed in terms of the *M'Naghten* test of criminal responsibility,[2] to which automatic exception is presumed to have been taken by Ohio law. Ohio Revised Code Sec. 2321.03.

During the course of the trial it developed that petitioner was a 24 year old man (R. 1018) who had completed the eighth grade with difficulty (R. 697), was unable to complete the ninth grade (R. 697), gave up school altogether and worked sporadically thereafter as a laborer (R. 697). He was arrested for robbery at fourteen and for several sex offenses by the time he was seventeen years of

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[2] "* * * Whether at the time of the homicide the brain of the defendant was partially deranged or diseased from some cause, to such an extent that his will power, his judgment, reflection and control of his mind was so impaired that the act of homicide was the result of diseased or deranged mind so that by reason thereof he was unable at the time to control his act, *and that by reason of such condition of mind he was unable at the time to distinguish between right and wrong.*" R. 1131-1132. (Emphasis supplied.)

age (R. 697). In military service, he became a chronic alcoholic, stood court-martial five times and was ultimately dismissed from service with an undesirable discharge (R. 698). He had an unstable marital adjustment and was unable to hold a job (R. 698). Wechsler-Bellevue intelligence test revealed an I.Q. of 85, a score in the low-normal range, but his comprehension ability and his ability to grasp abstract relationships were poor and disproportionately low (R. 725).

Both medical experts agreed that petitioner was a constitutional psychopath (R. 706, 910, 912) who knew the difference between right and wrong (R. 707, 895) but who lacked judgment or control of his impulses (R. 708, 906) and that the pattern of a very sick personality was manifest (R. 707, 911). The medical expert for the defense further described constitutional psychopathic personalities as persons who "cannot live within the confines of any rules of conduct" (R. 707), "who act impulsively and repeat anti-social offenses if unrestrained" (R. 707). He testified that petitioner "lacks the capacity to control himself" and "has the kind of personality which will act on impulse even though he may know that what he does * * * might be wrong" (R. 708). He concluded that petitioner was "suffering from a mental disorder which doesn't permit him to exercise proper control" (R. 710). The prosecution medical expert's testimony was strikingly similar to that of the defense expert except that he denied that constitutional psychopaths lack the capacity to control themselves; he contended that although such persons have the capacity to control themselves "they just do not use it" (R. 910).

From a conviction of first degree murder without a recommendation of mercy, petitioner appealed. The Court of Appeals for the Ninth Judicial District of Ohio affirmed

the conviction on October 28, 1964 and on March 30, 1966, the Ohio Supreme Court affirmed the conviction as well.

It is from these adverse rulings that petitioner seeks relief by petition for certiorari in this Court.

REASONS FOR GRANTING THE WRIT.

I.

CAPITAL PUNISHMENT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner stands convicted of first degree murder as that offense is defined in Ohio Revised Code Section 2901.01. The penalty clause of that statute provides that "unless the jury trying the accused recommends mercy" the violator of the statute "shall be punished by death." In the absence of such a mercy recommendation in his case, and in the event of an unfavorable disposition of this application, petitioner will be exterminated at the hands of the State of Ohio in precise conformity with its statutory authority.

Petitioner therefore calls upon this Court to grant his petition for writ of certiorari in order to re-examine the basic question of whether a state has the constitutional power to put an individual to death in deliberate and premeditated fashion in furtherance of its criminological purposes.

In short, petitioner, cognizant of the prior contrary authority [3] seeks reconsideration of the constitutionality of capital punishment by this Court. He contends that through the perspective of present-day experience and morality, capital punishment is "cruel and unusual" as this.

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[3] *Wilkerson v. Utah*, 99 U. S. 130 (1878); *In re Kemmler*, 136 U. S. 436 (1890); *O'Neil v. Vermont*, 144 U. S. 323 (1892); cf. *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1947). And see dictum in *Trop v. Dulles*, 356 U. S. 86, 97 (1958).

language is employed in the Eighth Amendment,[4] that the Eighth Amendment is applicable to the states through the Due Process Clause of the Fourteenth [5] and that, independent of the Eighth Amendment, the infliction of capital punishment as a criminological technique is arbitrary, capricious, beyond the police power of government, bears no reasonable relationship to any legitimate function of government and, consequently, directly violates the Due Process Clause of the Fourteenth Amendment.[6]

In measuring capital punishment against the yardstick of the Eighth Amendment, petitioner urges that execution by the state is both "cruel" and "unusual" as these terms have been interpreted by this Court.

Whatever the precise meaning of these words[7] "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that the power be exercised within the limits of civilized standards." [8]

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[4] Amendment VIII, United States Constitution: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*" (emphasis supplied).

[5] *Robinson v. California,* 370 U. S. 660 (1962). And see dictum in *Louisiana ex rel. Francis v. Resweber,* 329 U. S. 459, 463 (1947).

[6] See analogous argument of Mr. Justice Brennan, concurring in *Trop v. Dulles,* 356 U. S. 86, 105 (1958).

[7] For purposes of this petition, petitioner will avoid the possible ambiguities and subtleties of meaning of the phrase "cruel and unusual." Despite speculation as to whether its true constitutional meaning is "cruel *or* unusual," "unusually cruel" or whether the words "cruel" and "unusual" are interchangeable in meaning, see *Trop v. Dulles,* 356 U. S. 86, 100, f. n. 32 (1958), this Court has tended to consider the clause in non-technical terms as a basic prohibition against inhuman treatment. See *Weems v. United States,* 217 U. S. 349 (1910).

[8] *Trop v. Dulles,* 356 U. S. 86, 100 (1958).

Beginning almost ninety years ago, this Court gave a static interpretation to its consideration of capital punishment in relation to the Eighth Amendment. In *In Re Kemmler*,[9] conceding that such extreme penalties as "burning at the stake, crucifixion, breaking on the wheel, or the like".[10] were cruel and unusual punishments, the Court held that electrocution was not prohibited by the Eighth Amendment.[11]

But in *Weems v. United States*,[12] a more dynamic approach to interpreting the Eighth Amendment was adopted by this Court. Departing from the *Kemmler* view that the barbarous punishments of old England provided the outer limits of the prohibitions of the Eighth Amendment, Justice McKenna, speaking for the Court, refused to accept the notion that the restriction on cruel and unusual punishments "was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history." [13]

Continuing the dynamic philosophy which has been the father of this Court's more recent progeny, he observed:

> "* * * a principle to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions * * *. In the application of a Constitution, therefore, our contemplation cannot be only of what has been, but of what may be." [14]

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[9] 136 U. S. 436, 446-447 (1890).

[10] *Id.* at 447.

[11] To the same effect, see *Wilkerson v. Utah*, 99 U. S. 130 (1878) and *O'Neil v. Vermont*, 144 U. S. 323 (1892). Cf. *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1947).

[12] 217 U. S. 349 (1910).

[13] *Id.* at 373.

[14] *Ibid.*

This determination that the definition of cruelty must be fashioned in terms of the present and future needs of society rather than some medieval norm which antedated the Bill of Rights has carried forward to this Court's more recent pronouncements on the subject.

In *Trop v. Dulles*,[15] the dynamic approach of *Weems* was expressly approved by this Court. Holding that deprivation of citizenship as a punishment for military desertion was cruel and unusual, Mr. Chief Justice Warren, speaking for the Court, noted that "the words of the [Eighth] Amendment are not precise, and * * * their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [16]

And in *Robinson v. California*,[17] applying the same dynamic view of the "cruel and unusual punishments" clause to the states through the Fourteenth Amendment, the Court held cruel and unusual the punishment of incarceration provided by a California statute for narcotics addiction, without proof of purchase, possession or use.

Despite the protests of the cases which have denied constitutional infirmity to capital punishment[18] because it is only "the infliction of *unnecessary* pain in the execu-

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[15] 356 U. S. 86 (1958).

[16] *Id.* at 100-101. It is true that in an aside which must be considered dictum, the Court commented in *Trop* that "the death penalty has been employed throughout our history, and, *in a day when it is still widely accepted*, it cannot be said to violate the constitutional concept of cruelty." *Id.* at 99 (Emphasis supplied). But almost a decade has passed since this judicial utterance and petitioner is prepared to demonstrate that a new day—a day in which capital punishment is not widely accepted—has arrived. See argument, *infra*, pp. 20-21.

[17] 370 U. S. 660 (1962).

[18] E.g., *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1947).

tion of the death sentence" [19] which violates the command of the Eighth Amendment, the Court's suggestion that somehow its decisions striking down much less severe penalties than death on some relative basis are not inconsistent with preservation of capital punishment,[20] requires re-examination.

The imposition of a fine and twelve to twenty years imprisonment for falsifying a public record,[21] withdrawal of citizenship for desertion[22] and imposition of a relatively short period of imprisonment for narcotics addiction[23] all have been held cruel and unusual punishments on the ground that the excessive length or severity of the punishment in each case was disproportionate to the offense. The humane and civilized direction of these decisions is not here under attack. But petitioner submits that capital punishment—the deliberate snuffing out of human life by the state—is *absolutely* excessive punishment, no matter how heinous the offense sought to be punished, in view of the availability of less drastic means of achieving legitimate governmental ends in the control of criminal conduct.

Viewed against the alternatives of imprisonment for a specific term, life imprisonment, indeterminate sentences or incarceration in a mental institution until cure

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[19] *Id.* at 436 (Emphasis supplied).

[20] "* * * it is * * * plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination." *Trop v. Dulles*, 356 U. S. 86, 99 (1958). But see dissenting opinion of Mr. Justice Frankfurter, joined by Burton, Clark and Harlan, JJ.: "Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?" *Id.* at 125.

[21] *Weems v. United States*, 217 U. S. 349 (1910).

[22] *Trop v. Dulles*, 356 U. S. 86 (1958).

[23] *Robinson v. California*, 370 U. S. 660 (1962).

is effected, it is difficult to visualize a legitimate governmental purpose for the death penalty. The "permissible aims of punishment (e.g., deterrence, isolation, rehabilitation)" [24] are not, according to present day evidence, any better served by the death penalty than by less homicidal forms of punishment.[25] And one may be permitted wryly to observe that a government which seeks to justify that ultimate invasion of individual rights—the taking of life—must bear the burden of proof of justification. That this burden has not been met is manifest.[26]

The vast philosophic gulf between the Court's present thinking about cruel and unusual punishment and its past adherence to the constitutionality of the death penalty "indicate[s] something wrong at the beginning or that something has become wrong since then. [It] also show[s] that correction, though in process, is incomplete * * *." [27]

It appears manifest that in the period of almost two decades since this Court last had before it the question of the constitutional cruelty of the death penalty,[28] the

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[24] *Rudolph v. Alabama*, 375 U. S. 889, 891 (1963) (dissenting opinion). And see *Williams v. New York*, 337 U. S. 241 (1949); *Trop v. Dulles*, 356 U. S. 86, 111 (1958) (concurring opinion of Brennan, J.).

[25] See collected essays in Bedau, *The Death Penalty in America* (Doubleday 1964).

[26] *Ibid.*

[27] *Georgetown College v. Hughes*, 130 F. 2d 810, 812 (D. C. Cir. 1942).

[28] *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1947). Technically, *Resweber* did not consider anew the question decided a half-century earlier in *Wilkerson v. Utah*, 99 U. S. 130 (1878) and *In re Kemmler*, 136 U. S. 436 (1890), but, assuming the validity of these decisions, held that an accidental electrical failure which necessarily subjected a prisoner to the electric chair twice before the death penalty could be executed was not a violation of the Eighth Amendment. The closest the

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attitudes of the nation and the Court in regard to civilized standards of criminal control have been altered markedly in the direction of humane treatment.

It may well be that our society has now reached that level of maturity which recognizes the inherent cruelty of executing human beings as a matter of deliberate governmental policy, a cruelty so well captured in a century-old passage from Dostoevsky:

> "But the chief and worst pain may not be in the bodily suffering but in one's knowing for certain that in an hour and then in ten minutes, and then in half a minute, and then now, at the very moment the soul will leave the body and that one will cease to be a man and that that's bound to happen; the worst part of it is that it's certain * * *. To kill for murder is a punishment incomparably worse than the crime itself. Murder by legal sentence is immeasurably more terrible than murder by brigand. Anyone murdered by brigands, whose throat is cut at night in a wood, or something of that sort, must surely hope to escape till the very last minute * * *. But in the other case (execution) all that last hope, which makes dying ten times as easy, is taken away for certain. There is the sentence, and the whole awful torture lies in the fact that there is certainly no escape, and there is no torture in the world more terrible * * *."[29]

There are ever-increasing signs that those responsible for the administration of our penal codes, our prison officials, our courts, our criminologists, and the public have

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Court has come since *Resweber* to re-examining this question has been the dictum in *Trop v. Dulles*, see f. n. 16, *supra*, and the dissenting opinion of Mr. Justice Goldberg joined by Douglas and Brennan, JJ. in the denial of certiorari in *Rudolph v. Alabama*, 375 U. S. 889 (1963).

[29] Dostoevsky, *The Idiot*, 19-21 (1958).

reached this level of awareness.[30] Thirteen states[31] have virtually abolished capital punishment, and in those jurisdictions in which capital punishment still remains on the statute books, its virtual abolition is *de facto*, if not *de jure*. According to figures of the United States Department of Justice,[32] the number of executions throughout the nation has been steadily on the decline since 1954, despite substantial population growth and increase in the incidence of crime.[33] The Attorney General of the United States has indicated that the Administration would support legislation to abolish the death penalty for federal crimes[34] and the attacks upon capital punishment by responsible persons have steadily mounted.[35] The news media have joined the battle[36] and such organizations as the American Civil Liberties Union have recently made abolition of capital punishment a part of their legislative and litigation program.[37]

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[30] See collected essays in Bedau, *The Death Penalty in America* (Doubleday 1964).

[31] Alaska, Delaware, Hawaii, Iowa, Maine, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin.

[32] Reported in New York Times, February 18, 1966, Section L, p. 4, col. 1.

[33] Throughout the entire nation only seven convicts were put to death in 1965, New York Times, February 18, 1966, Section L, p. 4, col. 1. In 1964 the total was fifteen, in 1963, twenty-one and in 1962, forty-seven. *Ibid.* In Ohio, where this prosecution originated, there have been no executions for more than three years. Private correspondence, *E. L. Maxwell, Warden, Ohio Penitentiary to Larry S. Gordon; August* 15, 1966.

[34] *Op. cit.*, footnote 32, *supra.*

[35] E.g., Bedau, *The Death Penalty in America* (Doubleday 1964); DiSalle, *The Power of Life or Death* (Random House 1965); Herman, *An Acerbic Look at the Death Penalty in Ohio*, 15 West. Reserve L. R. 512 (June 1964).

[36] See examples of news media opinion collected in Appendix C, pp. 65a-76a.

[37] See ACLU statement in Appendix C, p. 77a.

The "evolving standards of decency that mark the progress of a maturing society" [38] appear clearly to be coalescing in the direction which, in the context of current attitudes, morality and knowledge, has become a constitutional imperative: the removal of the death penalty from our penal landscape.

"The Eighth Amendment expresses the revulsion of man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man." [39] By what more fitting instrument can this last vestige of medieval criminological thought be eliminated from our society?

There is yet another route to the same result. It is well established that in order to meet the test of due process of law, legislation enacted by the state pursuant to the police power must have a legitimate governmental purpose, the legislative means adopted to accomplish such purpose must bear a real and substantial relationship to the legislative goal, and such means must not interfere with private rights to a greater extent than necessary.[40] The legislative scheme which authorizes imposition of the death penalty bears no rational relationship to legitimate governmental aims in the sphere of criminal control and punishment: deterrence, isolation and rehabilitation.[41] The only other end served by capital punishment is what Mr. Justice Brennan has chosen to call "naked venge-

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[38] *Trop v. Dulles*, 356 U. S. 86, 101 (1958).

[39] *Robinson v. California*, 370 U. S. 660, 676 (1962) (concurring opinion).

[40] *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, 558 (1914); *Liggett Co. v. Baldridge*, 278 U. S. 105, 111-112 (1928); *Treigle v. Acme Homestead Association*, 297 U. S. 189, 197 (1936); 16 *C. J. S.*, Constitutional Law, Sec. 195, pp. 938 *et seq.*

[41] See argument, pp. 18-19, *supra*.

ance" [42]—a governmental aim which is repugnant to our concepts of fundamental fairness.[43]

Petitioner urges this Court to grant his petition for writ of certiorari to review the constitutionality of capital punishment as measured by the Eighth and Fourteenth Amendments.

II.

THE M'NAGHTEN TEST OF CRIMINAL RESPONSIBILITY VIOLATES THE FOURTEENTH AMENDMENT.

Petitioner stands convicted of first degree murder, an offense for which Ohio has imposed the death penalty. His plea of not guilty by reason of insanity squarely placed in issue at the trial the question of his criminal responsibility by reason of his mental and emotional condition.

During the trial, the psychiatric expert testimony presented by both the prosecution and the defense was compressed into the standards of criminal responsibility known as the *M'Naghten* Rule[44] to which Ohio has been committed since 1843;[45] the jury was likewise instructed by the trial court to resolve the issue under the same standard.[46]

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[42] *Trop v. Dulles*, 356 U. S. 86, 112 (1958) (concurring opinion).

[43] "Revenge is a kind of wild injustice which the more man's nature runs to, the more ought law to weed it out." Sir Francis Bacon, reported in *United States v. Freeman*, 357 F. 2d 606; 615 (2d Cir. 1966).

[44] "[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *M'Naghten's Case*, 10 Clark and Fin. 200, 210, 8 Eng. Rep. 718, 722 (H. L. 1843).

[45] *Clark v. State*, 12 Ohio 483 (1843).

[46] See portion of charge to jury quoted in f. n. 2, *supra*, p. 12.

Nor is it surprising that the jury rejected the plea of insanity urged by the defense. For, despite unanimity between the experts for both the prosecution and the defense that petitioner was mentally ill at the time of the commission of the charged offense, and despite the almost presumptively insane facts which the jury chose to believe (that petitioner, 24 years old, killed an 85 year old woman during the perpetration of rape), both experts agreed that petitioner knew the difference between "right" and "wrong," and under the jury instructions given by the court, that ended the matter.

It is not petitioner's intention to fault either the trial judge who, following his oath of office, applied the existing law of Ohio to the question, the psychiatrists whose testimony was confined by that court within the *M'Naghten* straitjacket, or the jury which, given the instructions by which it was bound, had no realistic choice. Rather, the villain of this piece is the hoary *M'Naghten* Rule itself, the product of an age of ignorance and superstition, which has grown older but not wiser with use and the passage of time.

Petitioner therefore urges this Court to grant his petition for writ of certiorari to examine the *M'Naghten* test of criminal responsibility and rule that it is an arbitrary, capricious and fundamentally unfair test of criminal responsibility and, consequently, a denial of due process of law as guaranteed by the Fourteenth Amendment. He does not, by any means, suggest that the Court adopt affirmatively any of the alternate formulations of criminal responsibility which various courts have employed to supplant *M'Naghten*[47] or that it evolve a new standard which

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[47] E.g., *Durham v. United States*, 214 F. 2d 862, 875 (D. C. Cir. 1954): "An accused is not criminally responsible if his un-

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incorporates contemporary psychiatric knowledge into a formula which meets Fourteenth Amendment criteria. This Court's bare ruling that *M'Naghten* does not comply with due process standards will be sufficient stimulus to induce the criminal administrative apparatus of each state and federal district to devise imaginative contemporary formulae to replace it.

That civilized society must avoid punishing criminally those who lack substantial capacity to control their behavior is not at this late date in dispute. Nor can it be denied that failure of a state to provide an insanity defense for those accused who seek to assert it is a denial of due process of law within the meaning of the Fourteenth Amendment.[48]

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lawful act was the product of mental disease or mental defect." In *McDonald v. United States*, 312 F. 2d 847, 851 (D. C. Cir. 1962), the court modified *Durham* by defining mental disease or defect to include "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." Cf. *Model Penal Code* (Proposed Final Draft No. 1, 1961): "Section 4.01 *Mental Diesase or Defect Excluding Responsibility*: (1) a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. (2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." See *Vermont Stat. Anno.* § 13: 4801: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks adequate capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." And see The Royal Commission on Capital Punishment, 1949-1953 Report, Cmd. No. 8932 at 276: "* * * leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind or mental deficiency to such a degree that he ought not to be held responsible." See also *United States v. Currens*, 290 F. 2d 751, 774 (3rd Cir. 1961); *Blocker v. United States*, 288 F. 2d 853, 859-862 (D. C. Cir. 1961); *State v. Pike*, 49 N. H. 399, 407-408 (1869); *State v. Davies*, 146 Conn. 137, 143-149, 148 A. 2d 251, 254-257, *cert. den.* 360 U. S. 921 (1959).

[48] *Pate v. Robinson*, 383 U. S. 375 (1966).

It is here asserted that the kind of insanity defense that is provided such unfortunates must not be arbitrary or capricious; it must realistically deal with evolving standards of knowledge and morality; in short, it must employ fair and reasonable means of achieving the social values and governmental functions involved.

The origins and antecedents of the *M'Naghten* Rule are well known. Based upon primitive notions of human behavior already discredited, steeped in a milieu of superstition and belief in phrenology, witchcraft and wizardry, born of the vengeance and wrath of a frightened queen,[49] the *M'Naghten* Rule's origins forecast its subsequent value as a scale of criminal responsibility. It would remain a quaint historical curiosity, a ludicrous relic of a simpler age, but for the fact that its imperfections as a standard have clung, octopus-like, to many of our contemporary criminal administrative systems, and even today, as in the case at bar, its use results in the execution or imprisonment of shattered psyches and deficient personalities whose criminal behavior is congenital and to whom, as a matter of its own morality, society should give medical treatment and institutional support rather than fatal charges of electricity and long retributive prison terms.

At this stage of proceedings in the instant case, petitioner will not dwell on the inadequacies of *M'Naghten* as a litmus of criminal responsibility. Many analyses and studies in the area of psychiatry and law and case opinions

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[49] A summary of the history of the M'Naghten Rule appears in the remarkable opinion of Judge Kaufman of the Second Circuit Court of Appeals in *United States v. Freeman*, 357 F. 2d 606 (2d Cir. 1966). For the convenience of the Court, petitioner has reprinted pertinent portions of the opinion in Appendix C, *infra*, pp. 35a-64a. The historical summary may be found *infra*, pp. 41-47a.

have done so in depth.[50] It will suffice to quote from Judge Kaufman's recent opinion in *United States v. Freeman*,[51] for the Second Circuit Court of Appeals:

> "* * * the [M'Naghten] rule is faulted because it has several serious deficiencies which stem in the main from its narrow scope. Because M'Naghten focuses only on the cognitive aspect of the personality, i.e., the ability to know right from wrong, we are told by eminent medical scholars that it does not permit the jury to identify those who can distinguish between good and evil but who cannot control their behavior * * *.
>
> "Similarly, M'Naghten's single track emphasis on the cognitive aspect of the personality recognizes no degrees of incapacity. Either the defendant knows right from wrong or he does not and that is the only choice the jury is given. But such a test is grossly unrealistic; our mental institutions, as any qualified psychiatrist will attest, are filled with people who to some extent can differentiate between right and wrong, but lack the capacity to control their acts to a substantial degree * * *.
>
> "A further fatal defect of the M'Naghten Rules stems from the unrealistically tight shackles which they place upon expert psychiatric testimony. When the law limits a testifying psychiatrist to stating his

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[50] See generally Glueck, *Law and Psychiatry* (1962); Guttmacher & Weihofen, *Psychiatry and the Law* (1952); Roche, *The Criminal Mind* (1958); Watson, *A Critique of the Legal Approach to Crime and Correction*, 23 Law & Contemp. Prob. 611, 618-622 (1958); Rubin, *Psychiatry and Criminal Law* (1965); Biggs, *The Guilty Mind: Psychiatry and the Law of Homicide* (1955); Hall, *Psychiatry and Criminal Responsibility*, 65 Yale L. J. 761 (1956); Rome, *M'Naghten, Durham and Psychiatry*, 34 F. R. D. 93 (1964). See also *United States v. Freeman*, 357 F. 2d 606 (2d Cir. 1966), reprinted in part in Appendix C, *infra*, pp. 35a-64a, *State v. Colby*, 6 Ohio Misc. 19, 215 NE 2d 65 (1966).

[51] 357 F. 2d 606, 618-624 (2d Cir. 1966), reprinted in part in Appendix C, *infra*, pp. 35a-64a.

opinion whether the accused is capable of knowing right from wrong, the expert is thereby compelled to test guilt or innocence by a concept which bears little relationship to reality * * *.

"The true vice of M'Naghten is not * * * that psychiatrists will feel constricted in artificially structuring their testimony but rather that the ultimate deciders—the judge or the jury—will be deprived of information vital to their final judgment. For whatever the social climate of Victorian England, today's complex and sophisticated society will not be satisfied with simplistic decisions, based solely upon a man's ability to 'know' right from wrong * * *.

"The gravamen of the objections to the M'Naghten Rules is that they are not in harmony with modern medical science which * * * is opposed to any concept which divides the mind into separate compartments—the intellect, the emotions and the will * * *.

"* * * No one would suggest that a physician—expert called to state an opinion with respect to a litigant's orthopedic or neurological condition should be restricted in his reply to a single isolated cause to the exclusion of other relevant and important findings and conclusions—much less to concepts developed at the outset of Victoria's reign. In a criminal trial, when life and liberty hang in the balance, such arbitrary limitations on expert and jury are all the less defensible."

It must be emphasized that despite overwhelming agreement among medical[52] and juristic[53] experts that the

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[52] E.g., See remarks of Dr. Lawrence Kolb, Director of the New York Psychiatric Institute, Professor and Chairman of the Department of Psychiatry at Columbia University: "* * * answers supplied by a psychiatrist in regard to questions of rightness or wrongness of an act or 'knowing' its nature constitutes a professional perjury." Remarks, Judicial Conference (2d Cir.), "Insanity as a Defense," 37 F. R. D. 365, 387 (1964). See also

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rule necessarily constricts the determination of criminal responsibility within arbitrary and unrealistic standards, this Court has never squarely met the question of whether M'Naghten meets Fourteenth Amendment requirements.[54] The growing dissatisfaction of the courts[55] and legisla-

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Guttmacher, "The Psychiatrist as an Expert Witness," 22 U. of Chi. L. Rev. 325 (1955).

[53] Mr. Justice Cardozo noted that "everyone contends that the present definition of insanity has little relation to the truths of mental life." *What Medicine Can Do For Law*, 32 (1930); Mr. Justice Frankfurter, in testimony before the Royal Commission on Capital Punishment observed: "I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated * * *. I think the M'Naghten Rules are in large measure shams. That is a very strong word, but I think the M'Naghten Rules are very difficult for conscientious people and not difficult enough for people who say 'We'll just juggle them.'." Report of the Royal Commission on Capital Punishment, 102 (1953). See Douglas, "The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists," 41 Iowa L. Rev. 485 (1956); Brennan, "Psychiatry Must Join in Defending Mentally Ill Criminals," 49 A. B. A. J. 239 (1960). And see Report, Royal Commission on Capital Punishment (1953) Cmd. No. 8932, at 276:

> "We consider that a preferable amendment of the law would be to abrogate the M'Naghten Rules * * *."

[54] It is true that in *Leland v. Oregon*, 343 U. S. 790, 800 (1952), Mr. Justice Clark said: "* * * the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law." But this remark was dictum because in *Leland* the issue upon which the decision turned involved the burden and standard of proof required by the state, not the content of the M'Naghten rule itself. Morever, scientific strides in the past decade and one-half, coupled with the expansion of the Fourteenth Amendment criminal due process commands during the same period and extensive experience with the proliferating standards of criminal responsibility in the state and federal courts suggest contemporary re-examination of this position.

[55] Four federal circuit courts have already abandoned M'Naghten as a standard of criminal responsibility. *Durham v.*

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tures[56] with the M'Naghten rule, resulting in a proliferation of different verbal formulae and approaches and rather curious judicial behavior[57] in regard to the problem of criminal responsibility indicates a need for contemporary examination of the rule by this Court, in the context of criminal due process considerations.

> "The genius of the common law has been its responsiveness to changing times, its ability to reflect developing moral and social values. Drawing upon the past, the law must serve and traditionally has served the needs of the present. In the past century, psychiatry has evolved from tentative, hesitant gropings in the dark of human ignorance to a recognized and important branch of modern medicine. The outrage of a frightened Queen has for too long caused us

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United States, 214 F. 2d 862 (D. C. Cir. 1954); *Wion v. United States*, 325 F. 2d 420 (10th Cir. 1964); *United States v. Currens*, 290 F. 2d 751 (3rd Cir. 1961); *United States v. Freeman*, 357 F. 2d 606 (2d Cir. 1966). See also *State v. Davies*, 146 Conn. 137, 148 A. 2d 251 (1959); *People v. Krugman*, 377 Mich. 559, 141 N. W. 2d 33 (1966); *State v. Colby*, 6 Ohio Misc. 19, 215 NE 2d 65 (1966); cf. *State v. Shoffner*, 35 U. S. L. Week 2019 (Wisc. 7-1-66).

[56] In 1957 Vermont abolished *M'Naghten* by statute. Vermont Stat. Anno. § 13:4801. In 1965 New York did the same. New York Penal Law § 1120. Maine and Illinois have done likewise. Maine Revised Stat. Anno., Title 15, § 102; Smith-Hurd Ill. Stat. Anno., Ch. 38, § 6-2.

[57] In *State v. Colby*, 6 Ohio Misc. 19, 22, 215 N. E. 2d 65, 66 (1966), after noting that the trial evidence had complied with M'Naghten sufficiently for the court as trier of fact to find the accused not guilty by reason of insanity, the court gratuitously noted "a duty to speak out on" M'Naghten. "The court has reached the conclusion that * * * the M'Naghten rule * * * is based on an entirely obsolete and misleading conception of the nature of insanity * * *."

In *State v. Shoffner*, 35 U. S. L. Week 2019 (Wisc. 7-1-66) the court ruled that, as an experiment, an accused who asserted insanity as a defense could thereafter be tried under his choice of M'Naghten or the A. L. I. definition.

to forego the expert guidance that modern psychiatry is able to provide." [58]

The need for review of M'Naghten is great. The record in this case presents a clear opportunity.

Petitioner urges the Court to grant his petition for writ of certiorari to examine, and discard as repugnant to the commands of the due process clause of the Fourteenth Amendment, the *M'Naghten* rule of criminal responsibility.

III.

BLOOD-STAINED CLOTHING TAKEN FROM PETITIONER'S HOME WAS SEIZED IN VIOLATION OF THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS.

Petitioner urges this Court to grant his petition for writ of certiorari to review the admission in evidence at his trial of blood-stained clothing seized from his residence as a result of two warrantless searches by state police officers. His contention that the evidence was illegally obtained encompasses Questions Presented, Nos. III, IV, V, VI, VII and VIII, *supra*, pp. 2-4, which are grouped together for treatment in this section because of their relationship to general principles of the law of arrest and search and seizure.

Detached but dedicated adherence to constitutional principle is particularly important in the case at bar, for it cannot be denied that the crime involved was heinous and that blood-stained clothing allegedly[59] connecting the

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[58] *United States v. Freeman*, 357 F. 2d 606, 624-625 (2d Cir. 1966), reprinted in part in Appendix C, *infra*, pp. 35a-64a.

[59] The defense contended throughout that the bloodstained trousers offered in evidence were not those he had worn on the night of the decedent's death (R. 878). Even the prosecution witnesses were confused as to whether the trousers offered in evidence were those seized in the second or third searches of the premises (R. 592-594).

petitioner to the offense was actually seized. But it is too late in the day and too destructive of constitutional values to attempt to "justify the arrest by the search and at the same time justify the search by the arrest." *Johnson v. United States*, 333 U. S. 10, 15 (1947). This Court "has had frequent occasion to point out that a search is not to be made legal by what it turns up. In law, it is good or bad when it starts and does not change character from its success." *United States v. Di Re*, 332 U. S. 581, 595 (1948).

It is petitioner's contention that (A) the arresting officers did not have probable cause to arrest petitioner and that any warrantless search conducted incidental thereto must fail because the arrest was illegal; (B) since the police officers had ample time and opportunity to procure an arrest and search warrant, but failed to do so, the warrantless arrest, search and resultant seizure of evidence were illegal, whether or not they had probable cause to arrest or search; (C) since petitioner was arrested outside his home after a preliminary search of his residence in his absence, the search conducted thereafter was not incidental to arrest and, whether or not the arrest was lawful, the warrantless search was illegal; (D) the warrantless search of the entire residence of the petitioner was a general and roving search, and therefore illegal; (E) the seizure of blood-stained clothing from the home of petitioner was a seizure of merely evidentiary matter which can never be legally seized, no matter how lawful the arrest or search which preceded it; and (F) the illegality of the arrest and search was not cured by the consent of anyone authorized to waive petitioner's constitutional rights.

Each of these positions will be considered below.

A.

The Arresting Officers Did Not Have Probable Cause to Arrest Petitioner.

The undisputed testimony in the record[60] demonstrates that petitioner was arrested without a warrant, upon the basis of only the following information in the possession of the arresting officers at the time of his arrest: (1) the assailant must have been known to the victim, because there was no sign of forcible entry of the decedent's residence; (2) petitioner and his wife had been tenants of the decedent and had left the premises in a damaged condition and owing back rent; (3) one of the deputies had tried to serve an assault and battery warrant upon petitioner several months earlier, but without success because petitioner was out of the state at the time; and (4) about one and one-half years earlier, another deputy had questioned petitioner in connection with several burglaries, offenses with which he was never charged.

This Court has most recently declared that the test of whether a warrantless arrest complies with the Fourth and Fourteenth Amendments depends upon "whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." [61]

Acknowledging that this rule is operative in state criminal proceedings, the Ohio Supreme Court in the instant case disposed of the merits of the issue in two paragraphs of its opinion:

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[60] See Statement and record references therein contained, *supra*, pp. 7-14.

[61] *Beck v. Ohio*, 379 U. S. 89, 91 (1964).

"In the instant case, the officers had *probable cause to suspect* the defendant of the offense which had been committed. It was within their knowledge that (1) the assailant must have been known to the victim, since there was no sign of forcible entry; (2) it was an offense of a violent nature; (3) the defendant was known to the victim, having rented her upstairs apartment and had a previous record, including sexual offenses; and (4) he was a large and powerful man and was known to have a violent temper.

"This was not the untested hearsay statement of an unreliable informant but was based upon personal observation of the premises, conversation with the victim's granddaughter, who had known the victim and the defendant, and the personal knowledge of the officers." [62] (Emphasis supplied.)

Petitioner contends that if these facts demonstrate probable cause, then despite declarations by this Court and state courts in the abstract to the contrary, probable cause as a practical constitutional consideration of the lawfulness of an arrest and search has been effectively eliminated. Stripped to its essentials, the facts which the Ohio Supreme Court has sustained as probable cause amount only to knowledge that petitioner, a "bad actor" in the vicinity according to neighborhood folklore, was known to the decedent and therefore, despite the normal animus engendered by the fact that as a former tenant he had done damage to the premises and left owing back rent, decedent might have admitted him into her home without a struggle in the small hours of the night she met her

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[62] *State v. Woodards*, 6 Ohio St. 2d 14, 20-21, 215 N. E. 2d 568, 574-575 (1966). The finding of the Ohio Supreme Court that *at the moment of arrest* the arresting officers knew that petitioner had a previous record of sexual offenses is nowhere supported by the record. See f. n. 60, *supra*, p. 33.

death. Anyone in the world who might have been voluntarily admitted to the decedent's home at that hour was at least as suspect at the moment of arrest as petitioner.

A semantic clue to the reasoning of the Ohio Supreme Court may be its use of the phrase "probable cause to *suspect*," a much looser standard than "probable cause to *believe*," the operating constitutional requirement.[63] Since the mere suspicion of the arresting officers can never be enough to constitute probable cause to validate a warrantless arrest or search,[64] the analytic tool employed as well as the result reached by the Ohio court of last resort are constitutionally infirm.

Petitioner urges the Court to grant review of the Ohio court's finding of probable cause in the instant case under its power to "make an independent examination of the facts, the findings, and the record * * * where necessary to the determination of constitutional rights." [65].

B.

Failure to Obtain an Arrest and Search Warrant When Police Officers Had Ample Time and Opportunity to Do So Invalidates a Warrantless Arrest and Search.

The principle that law enforcement officials are required by the Fourth Amendment to seek a warrant for an arrest and search except upon a showing of *urgent necessity*[66] has been too frequently ignored by the police,

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[63] *Henry v. United States*, 361 U. S. 98 (1959); *Draper v. United States*, 358 U. S. 307 (1959); *Brinegar v. United States*, 338 U. S. 160 (1949).

[64] *Ibid.*

[65] *Ker v. California*, 374 U. S. 23, 34 (1963).

[66] See *McDonald v. United States*, 335 U. S. 451, 455 (1948), for a general statement of the rule and its rationale: "[The Fourth Amendment] guarantee of protection against unreason-

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unfortunately in many instances, with judicial acquiescence.

The dangers to fundamental constitutional values implicit in a system which permits a police officer to seek a warrant or not, at his discretion, are obvious. "An arrest without a warrant by-passes the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." [67]

The general rule requiring a warrant subject to narrow exceptions of necessity, rather than as an equally acceptable alternative to no warrant at all, has been, in large measure, eaten away by the corrosive exceptions which have been engrafted upon it. This circumvention of the requirements of the Fourth Amendment stems in large measure from the unfortunate decision of this Court in *United States v. Rabinowitz*[68] which substituted the generalized test of "reasonableness" of a search for the

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able searches and seizures * * *, *with few exceptions,* stays the hand of the police *unless they have a search warrant* * * *. We are not dealing with formalities. The presence of a search warrant serves a high function. *Absent some grave emergency,* the Fourth Amendment has interposed a magistrate between the citizens and the police * * *. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted * * *. We cannot be true to that constitutional requirement and excuse the absence of a search warrant *without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.*" (Emphasis added.)

[67] *Beck v. Ohio,* 379 U. S. 89, 96 (1964).

[68] 339 U. S. 56 (1950).

necessity of procuring a warrant if there was time and opportunity to do so.[69] But even in *Rabinowitz*, a magistrate had an opportunity to examine the facts alleged to demonstrate probable cause before the arrest and search, because there the search was incident to an arrest based upon a *valid warrant*. In the present case a judicial officer never had an opportunity to judge the question of probable cause because the police justified their warrantless search of the premises of the petitioner by an arrest which was also without a warrant. Moreover, *Rabinowitz* involved the search of business premises, not private dwellings, which have been accorded special protection by this Court.[70] That *Rabinowitz* has been, at very least, limited to its facts, seems apparent. Both before and since the holding in *Rabinowitz*, this Court has on a number of occasions pointed out that policemen are *not* permitted to make their own choice as to whether or not they will procure a warrant before making an arrest and search—that where urgent necessity to arrest and search are not present and it is practicable to obtain a warrant, an arrest or search without one will be constitutionally defective, even

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[69] For a biting critique of the decision, see Mr. Justice Frankfurter's dissenting opinion in *Rabinowitz*, 339 U. S. 56, 83-84 (1950):

> "There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a search warrant * * *. It is for this Court to lay down criteria that the district judges can apply. It is no criterion of reason to say that the district court must find it reasonable * * * [T]he presence or absence of an ample opportunity for getting a search warrant [is] very important. It is not a rule of thumb. It is a rule of the Fourth Amendment."

[70] Cf. *Agnello v. United States*, 269 U. S. 20 (1925); *McDonald v. United States*, 335 U. S. 451 (1948); *Johnson v. United States*, 333 U. S. 10 (1947); *Taylor v. United States*, 286 U. S. 1 (1932).

where the officers had the requisite factual knowledge to constitute probable cause.[71]

The instant case provides a clear illustration of a situation where law enforcement officers had ample time and opportunity to procure a warrant in advance of an arrest and search, but failed or refused to do so.

Here petitioner was married and a resident of the community. There were sufficient police officers deployed to arrest petitioner so that one of them could easily have gone to procure a warrant from a magistrate, if the police had been so inclined. The spectacle of all of these officers sitting in the noonday sun at petitioner's home for almost half an hour waiting for petitioner to return home from a shopping trip with his wife, unfortunately, from the police officers' standpoint, does not present the picture of stark police necessity that would justify their failure or refusal to seek a warrant. This demonstration of cynical disregard for constitutional values should stimulate this Court to re-examine the broad exceptions which have emasculated the general rule that a warrant is an imperative of the Fourth Amendment, to limit these exceptions to overriding police emergency, and to reaffirm the principle that, whether or not a search is incident to a valid arrest "law enforcement agents must secure and use search warrants wherever reasonably practicable."[72]

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[71] *Chapman v. United States,* 365 U. S. 610, 613 (1961); quoting with approval from *McDonald v. United States,* 335 U. S. 451 (1948); *Johnson vs. United States,* 333 U. S. 10 (1947); *Taylor v. United States,* 286 U. S. 1 (1932); *Agnello v. United States,* 269 U. S. 20, 33 (1925); *Weeks v. United States,* 232 U. S. 383 (1914); and see *Trupiano v. United States,* 334 U. S. 699 (1948), overruled on this point two years later in *Rabinowitz.* Mr. Justice Black's dry observation in *Rabinowitz* is pertinent: "In my judgment it would be wiser judicial policy to adhere to the *Trupiano* rule * * * at least long enough to see how it works." 339 U. S. at 67 (dissenting opinion).

[72] *Trupiano v. United States,* 334 U. S. 699, 705 (1948).

Petitioner urges the Court to grant his application for writ of certiorari to review the applicability of the *Rabinowitz* rule of "reasonableness," particularly in relation to searches of private dwellings.

C.

Neither of the Searches Was Incidental to Arrest.

There can be little doubt at this late date that a reasonable search incident to a lawful arrest is constitutionally justifiable in the absence of a warrant,[73] at least as to articles within the immediate physical control of the person arrested.[74] But the search must actually accompany and be incident to the lawful arrest which legitimizes it.[75] Thus, where the arrest occurs several blocks from the searched premises, a warrantless search is not justified as incidental to such arrest,[76] nor is an arrest in a dwelling a justification for a prior search of a garage on the same property.[77]

In the instant case, police officers entered and searched the residence of the petitioner three times, in

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[73] *Abel v. United States*, 362 U. S. 217 (1960); *United States v. Rabinowitz*, 339 U. S. 56 (1950); *Harris v. United States*, 331 U. S. 145 (1947); *Marron v. United States*, 275 U. S. 192 (1927); *Agnello v. United States*, 269 U. S. 20 (1925).

[74] Cf. *United States v. Lefkowitz*, 285 U. S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U. S. 344 (1931). And see dissenting opinion of Frankfurter, J. in *United States v. Rabinowitz*, 339 U. S. 56, 70-80 (1950): "I suggest that it makes a mockery of the Fourth Amendment to sanction search without a search warrant merely because of the legality of an arrest * * * the right to search the place of arrest is an innovation based on confusion, without historic foundation, and made in the teeth of a historic protection against it * * *."

[75] *Jones v. United States*, 357 U. S. 493 (1958); *Lustig v. United States*, 338 U. S. 74 (1949).

[76] *Agnello v. United States*, 269 U. S. 20 (1925).

[77] *Taylor v. United States*, 286 U. S. 1 (1932).

each instance without a warrant. In none of these instances can the search be classified as incident to an arrest so as to preclude the necessity of obtaining a warrant prior to search. The first time, a police officer entered petitioner's residence in his absence, about 25 minutes before petitioner's return and ultimate arrest. Even if the subsequent arrest had been on the searched premises it would not have justified the warrantless search which preceded it.[78]

The second entry and search occurred immediately after petitioner's arrest. It is significant to note that petitioner was arrested as soon as he stepped out of his car, which he had parked in the driveway of his home, some distance from the residence itself. A search of a dwelling cannot be justified by an arrest in the street.[79]

The third entry and search occurred after petitioner's arrest and after he was already in custody. Any reasons for validating a warrantless search as incident to an arrest "are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." [80]

On each of these occasions, the police officers displayed a callous disregard for the imperatives of the right of privacy. On each occasion [81] evidence was seized which

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[78] *Taylor v. United States*, 286 U. S. 1 (1932); *Jones v. United States*, 357 U. S. 493 (1958).

[79] *Agnello v. United States*, 269 U. S. 20 (1925); *Stoner v. California*, 376 U. S. 483 (1964); cf. *Hernandez v. Superior Court*, 143 Cal. App. 2d 20, 299 P. 2d 678 (1958).

[80] *Preston v. United States*, 376 U. S. 364, 367 (1964).

[81] Except perhaps the first search and seizure. The record is not clear as to whether the boots seized were ever received in evidence. But the principle remains clear because the searches are so interrelated that the illegality of one necessarily invalidates the others. See *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920).

was subsequently offered and received in evidence against petitioner. If, therefore, any one of the warrantless searches of the petitioner's dwelling was not incident to a lawful arrest,[82] petitioner's trial was tainted by illegally seized evidence. The flagrancy of the misconduct of the police officers in this respect is compounded by that of the Ohio courts which have condoned it. And the fact that the trial at which this illegally seized evidence was introduced resulted in a verdict which has condemned petitioner to death underscores the need for review in this Court.

D.

The Warrantless Search of the Entire Residence of the Petitioner Was a General and Roving Search.

The Fourth Amendment expressly prohibits searches without warrants "*particularly describing the place to be searched,* and *the persons or things to be seized.*" This language has its roots in this country's origins. The founders were all too acutely aware of the evils of the general warrant and writs of assistance.[83]

As a consequence of this historical development, the explicit command of the Fourth Amendment and the imperatives of a free society, this Court has frequently and resolutely set its face against general or roving searches. *Marcus v. Search Warrant,* 367 U. S. 717 (1961). See also Justice Butler's clear language in *Marron v. United States.*[84]

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[82] Petitioner has already urged the unlawfulness of the arrest, *supra,* arguments (A) and (B), pp. 33-39. Even if the court should hold (improperly in petitioner's judgment) that the arrest was valid in the case at bar, however, the warrantless search will still be unlawful if not incident to the arrest.

[83] For a historical account, see *Henry v. United States,* 361 U. S. 98, 100-101 (1959) and *Harris v. United States,* 331 U. S. 145, 157-163 (1947) (dissenting opinion).

[84] 275 U. S. 192, 195-196 (1927).

"General searches have long been deemed to violate fundamental rights. It is plain that the [Fourth] Amendment forbids them * * *."

In the instant case, a police officer entered the defendant's residence after he knew that nobody was at home, ostensibly looking for petitioner, searched the entire house and removed a pair of petitioner's shoes. Petitioner was arrested as he stepped out of his car in the driveway of his residence about half an hour later.

This conduct is a classic example of a general and roving search in which law enforcement authorities, without regard to the possible relevance of items sought, throw a broad dragnet to ensnare the entire contents of a house in order to sift out the tasty and incriminating morsels of evidence they have trapped. Its callousness taints the subsequent searches and seizures as well.[85]

E.

The Seizure of Blood-stained Clothing From Petitioner's Residence Was a Seizure of Mere Evidence, in Violation of the Fourth, Fifth and Fourteenth Amendments.

Petitioner further contends that the seizure of blood-stained clothing from his residence, no matter what the legality of the arrest and search, was an illegal seizure of his private possessions—material which was neither contraband, instrumentalities, nor fruits of crime—solely for the purpose of using them as evidence.

It has long been established that, by the intertwined effect of the search and seizure restrictions contained in the Fourth Amendment and the self-incrimination prohibition of the Fifth, the compulsory seizure and use in

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[85] Cf. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920).

evidence of private possessions which are neither contraband, instrumentalities nor fruits of crime are constitutionally prohibited.[86]

It is therefore contended that since the pertinent portions of both the Fourth and Fifth Amendments have become commands upon the states through the due process clause of the Fourteenth [87] and by virtue of the extension of the exclusionary rule to the states,[88] these items should have been suppressed at the petitioner's trial.

Petitioner is aware of no case in which this Court has considered the seizure of clothing within the framework of the mere evidence rule. But other courts have had the opportunity to do so.[89]

In the most recent consideration of this problem, Judge Sobeloff, in holding that in a burglary trial the prosecutor's use of clothing seized from the home of the accused violated the mere evidence rule, commented:

> "From time to time the line has wavered in the adjudication of the lawfulness of searches, but in no instance has the Supreme Court faltered in its adherence to the distinction between what may and what may not be seized in a lawful search. Nor is there any rational distinction between private papers that are of only evidential value and articles of clothing of the

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[86] *Boyd v. United States,* 116 U. S. 616 (1886); *Gouled v. United States,* 255 U. S. 298 (1921); *Entick v. Carrington,* 19 Howell's State Trials 1029 (1765); *United States v. Lefkowitz,* 285 U. S. 452 (1932). And see *Harris v. United States,* 331 U. S. 145, 154 (1947) for a concise statement of the rule.

[87] *Mapp v. Ohio,* 367 U. S. 643 (1961) (Fourth Amendment); *Malloy v. Hogan,* 378 U. S. 1 (1964) (Fifth Amendment).

[88] *Mapp v. Ohio,* 367 U. S. 643 (1961).

[89] *Morrison v. United States,* 262 F. 2d 449 (D. C. Cir. 1958) (soiled handkerchief used in committing act of sodomy held: evidentiary); *Hayden v. Warden,* ____ F. 2d ____ 35 U. S. L. Week 2020 (4th Cir. 1966), cf. *Morton v. United States,* 147 F. 2d 28 (D. C. Cir. 1945).

same character. Papers of only evidential value are not the sole items immune from seizure." [90]

Petitioner urges this Court to grant his petition for writ of certiorari to review the mere evidence rule in its application to these facts.

F.

The Illegality of the Arrest and Search Was Not Cured By the Consent of Anyone Authorized to Waive Petitioner's Constitutional Rights.

Although the opinion of the Ohio Supreme Court makes no reference to consent as an excuse for the illegal conduct of the police officers, petitioner feels compelled, because the issue is presented implicitly by the facts in the record, and as a matter of legal symmetry, to plug this aperture in the wall of illegality constructed by the arresting and searching officers.

The justification of an otherwise illegal search on the basis of consent stems from the view that consent operates as a waiver of constitutional objections.[91] But this Court has made it abundantly clear that "courts indulge every reasonable presumption against waiver of fundamental rights." [92] Accordingly, the prosecution has the burden to

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[90] *Hayden v. Warden*, ___ F. 2d ___, 35 U. S. L. Week at 2020 (4th Cir. 1966).

[91] See *Stoner v. California*, 376 U. S. 483, 488, 489 (1964):

> "Nor is there any substance to the claim that the search was reasonable because the police [relied] upon the night clerk's expression of consent * * *. It is important to bear in mind that it was the petitioner's constitutional right which was at stake here and not the night clerk's nor the hotel's. *It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent.*" (Emphasis supplied.)

[92] *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938); that federal rules of waiver of constitutional rights are applicable in state prosecutions, see *Brookhart v. Janis*, 384 U. S. 1 (1966).

prove by clear and positive evidence that voluntary consent was given.[93] In this connection, it must be noted that bare submission to official authority is not voluntary consent,[94] and certainly consent will not be inferred where there has been an arrest or other official pressure.[95] Nor can consent to search be obtained through deceit or misrepresentation.[96] Moreover, only the one whose privacy has been invaded, or one clearly acting as his agent, may waive his constitutional rights by giving consent to search.[97]

In the light of these basic principles, it will be recalled that in the instant case, two persons, in addition to the petitioner himself, allowed the police officers access to the premises on the day of his arrest. During the first search, a deputy entered the unoccupied premises in the company of an eight-year old boy who was petitioner's brother-in-law but who did not live on the premises. The boy had been told by police officers that petitioner had been in an automobile accident, and he entered the petitioner's residence under that misconception. Even if the boy's tacit acquiescence to a police officer who had misrepresented his reason for entry could be construed as consent, he did not bear a sufficient relationship to the petitioner or the premises to cut off petitioner's claim of violation of his constitutional right.

The second search, immediately after petitioner's arrest, was accomplished by means of petitioner's acquiescence to official pressure at a time when he was already

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[93] *Amos v. United States*, 255 U. S. 313 (1921).

[94] *Ibid.* And see *Johnson v. United States*, 333 U. S. 10 (1947). Cf. *People v. Wilson*, 145 Cal. App. 2d 1, 301 P. 2d 974 (1956); *State v. Trumbull*, 176 A. 2d 887 (Conn. 1961).

[95] *Channel v. United States*, 285 F. 2d 217 (9th Cir. 1960).

[96] *Commonwealth v. Wright*, 190 A. 2d 709 (Pa. 1963).

[97] *Stoner v. California*, 376 U. S. 483 (1964).

under arrest; the third search, after petitioner was already in jail, was effected by means of a grant of entry onto the premises by petitioner's wife and a bare announcement of the officer's intention to seize additional items from the house, without a request for, or grant of consent to do so. As an additional consideration, it must also be remembered that both petitioner and his wife had been deceived by the police into believing that petitioner had been arrested on a much less serious charge than that for which he ultimately was required to stand trial; any finding of voluntary consent to search must therefore be further discounted because of the misrepresentation of the deputies and the resultant misunderstanding of the seriousness of their plight by the petitioner and his wife.

A valid consent to the illegal arrest, search and seizures described in detail above cannot be manufactured from this record.

IV.

ORAL CONFESSIONS OBTAINED WHILE PETITIONER WAS IN CUSTODY WERE ADMITTED INTO EVIDENCE IN VIOLATION OF THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

Petitioner urges this Court to grant his application for writ of certiorari to review the admission in evidence during the State's case in chief of the testimony of several prosecution witnesses describing oral confessions allegedly made by him during the period he was in custody. His contention that the oral confessions were improperly admitted encompasses Questions Presented, Nos. IX, X, XI and XII, *supra*, pp. 4-5, which are grouped together for treatment in this section because of their relationship to general principles of the law of confessions.

It is petitioner's contention that (A) on the basis of the totality of circumstances, the oral confessions were

involuntary and were the result of a denial of counsel to the petitioner at a critical stage in the adversary proceedings; (B) the oral confessions were obtained during a period of illegal detention following an unconstitutional arrest, and, as the derivatives of an illegal arrest, they must be suppressed under the exclusionary rule which prohibits admission of evidence obtained in violation of the Fourth and Fourteenth Amendments; (C) since the oral confessions were elicited at least in part as a result of confrontation of the petitioner with blood-stained clothing illegally seized from his home, the confessions were inadmissible in evidence as derivative fruits of the illegal search and seizure; and (D) the oral confessions were obtained during a period of illegal detention resulting from the failure of the interrogating officers to arraign petitioner promptly in accordance with state law. Each of these contentions will be considered in sequence below.

A.

Oral Confessions Were Involuntary and Resulted From Denial of Right of Counsel.

The record demonstrates that petitioner was a twenty-four year old man of marginal intelligence who had been barely able to complete the eighth grade, that he could not complete the ninth grade and quit school to work sporadically as a common laborer. His comprehension ability and his ability to grasp abstract relationships, as measured by accepted intelligence measuring techniques, were, in absolute terms, poor, and disproportionately low in relation to his Wechsler-Bellevue I. Q. score of 85. Although his juvenile record and military career were characterized by frequent clashes with authority, his adult record was, prior to the charge for which he was convicted in the case at bar, free of felony charge or conviction. The

record is devoid of any suggestion that petitioner had ever been interrogated while in custody before. Mentally and emotionally, petitioner was a disturbed individual, variously characterized as a "constitutional psychopath," "a very sick personality" and "suffering from a mental disorder." He was a chronic alcoholic and had drunk heavily the day and night before his arrest.

He was arrested without a warrant for the rape-murder of an 85 year old woman, but at the time he was arrested, the arresting officer deceitfully told him only that he was a suspect in a fictitious gasoline station robbery, in violation of the Ohio law of arrest.[98] He was taken to the county jail by the arresting officers about 2:00 p.m. on July 13, 1963, and he remained there without formal charge until about 6:15 p.m. on July 15, 1963, a period of more than 76 hours. During this entire period of detention, petitioner was held incommunicado, questioned at length by interrogating officers operating in relays for as long as five hours at a time, and kept in solitary confinement except during periods of questioning in an interrogation room. At the very outset and during the course of the interrogation, petitioner was told that it could be proved that he was in the home of the decedent at the time of her death, and he was pressed to make a statement. Petitioner persisted in his denial of any implication in the murder at least until 1:15 p.m. on July 15, 1963, more than 71 hours after his arrest. He was never advised of his right to counsel because, according to the testimony of one of the interrogating officers, he was presumed to

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[98] See Ohio Revised Code, Section 2935.07 which reads in pertinent part:

> "When an arrest is made without a warrant by an officer, he shall inform the person arrested of such officer's authority to make the arrest and *the cause of the arrest* * * *." (Emphasis supplied.)

be innocent during the period of interrogation (!) although at all times they treated him as the prime suspect.

As a part of the pressures of the interrogation technique, petitioner was confronted with his own blood-stained clothing illegally seized from his house after his arrest; in addition, the chief interrogation officer read and explained to petitioner in language he could understand significant passages of a book on legal medicine, apparently to demonstrate the prevalence of aggressive sexual behavior among senile women, in the hope that, as a more socially acceptable alternative explanation than rape, the petitioner's admission of sexual relations with the decedent on the night of her death would be more rapidly forthcoming.

At some time in the afternoon of July 15, 1963, petitioner made a full confession. He was taken to the decedent's home where he re-enacted the events which led to decedent's death, and immediately thereafter, about 6:15 p.m., the interrogating officers took him to the Elyria Municipal Court, after its closing hour, to charge him with first degree murder.

Although they telephoned and appeared at the jail during the interrogation period, petitioner's wife and parents were not permitted to see petitioner or to learn the true nature of the charge against him. But immediately after he was charged, petitioner was permitted to telephone his wife and receive visitors.

Petitioner's first contact with a lawyer was at his arraignment the following day. But by then the damage had been done.

Had this Court elected to apply its recent decisions of *Miranda v. Arizona*[99] and *Escobedo v. Illinois*,[100] to

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[99] 384 U. S. 436 (1966).

[100] 378 U. S. 478 (1964).

pending direct appeals, petitioner's clear right to a new trial on the basis that his confession should have been suppressed would require no further comment.[101] But in *Johnson v. New Jersey*,[102] this Court not only concluded "that *Escobedo* and *Miranda* * * * should not be applied retroactively" [103] but further declined "to extend *Escobedo* and *Miranda* to cases tried before those decisions were announced." [104] Whatever the merits of such a stringent and unusual retroactivity policy,[105] petitioner is now bound by *Johnson* to demonstrate the involuntariness of his confession by case law prior to January 31, 1964. Petitioner therefore "invoke[s] a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years." [106]

In considering the voluntariness of a confession under the due process clause of the Fourteenth Amendment,[107]

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[101] The clear testimony of the interrogating officers that during the entire interrogation and after the investigation had focused on petitioner as a suspect, they had refused his family admittance to see him and failed to advise him of his right to counsel falls squarely within the rule of reversal of *Miranda* and within a liberal interpretation of the rule of *Escobedo*.

[102] 384 U. S. 719 (1966).

[103] 384 U. S. 719, 86 S. Ct. 1772, 1780 (1966).

[104] Id. at 1781.

[105] See the dissenting opinion of Mr. Justice Black, joined by Douglas, J. in *Linkletter v. Walker*, 381 U. S. 618, 640 (1965). It is curious to note that under this strict interpretation of retroactivity, both Escobedo and Miranda whose trials occurred *prior* to that of petitioner in the instant case, received the benefit of the liberal confession rules announced in their cases, while petitioner, who was tried *later* than both of them, has no recourse whatever to these rules.

[106] *Johnson v. New Jersey*, 384 U. S. 719, 86 S. Ct. 1772, 1779 (1966).

[107] To the extent that coerced confession standards have been raised by the application of the self-incrimination clause of the Fifth Amendment to the states through the Fourteenth in *Malloy v. Hogan*, 378 U. S. 1 (1964), petitioner asserts this companion argument as well.

"the question in each case is whether the defendant's will was overborne at the time he confessed." [108] "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." [109] This determination can be made "only by an examination of all of the attendant circumstances." [110]

The day has long since passed that "the blood of the accused" was "the only hallmark of an unconstitutional inquisition." [111] More subtle but just as effective means of overpowering the will of an accused have been devised and are in use by skillful professional interrogators. As this Court noted in *Haynes v. Washington*: [112]

> "We cannot blind ourselves to what experience unmistakably teaches: that even apart from the express threat, * * * the secret and incommunicado detention and interrogation * * * are devices adopted and used to extort confessions from suspects."

Confessions elicited from the accused in custody after interrogation have been in a number of instances held to violate the fundamental fairness requirements of the due process clause of the Fourteenth Amendment. At this juncture it will not do to compare all of these fact situations with the circumstances in the case at bar. It will suffice

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[108] *Lynumn v. Illinois*, 372 U. S. 528, 534 (1963); see also *Chambers v. Florida*, 309 U. S. 227 (1940); *Watts v. Indiana*, 338 U. S. 49 (1949); *Leyra v. Denno*, 347 U. S. 556, 558 (1954); *Reck v. Pate*, 367 U. S. 433, 440 (1961).

[109] *Wilson v. United States*, 162 U. S. 613, 623 (1896) and see *Bram v. United States*, 168 U. S. 532 (1897).

[110] *Haynes v. Washington*, 373 U. S. 503, 513 (1963). And see *Columbe v. Connecticut*, 367 U. S. 568 (1961).

[111] *Blackburn v. Alabama*, 361 U. S. 199, 206 (1960); cf. Brown v. Mississippi, 297 U. S. 278 (1936).

[112] 373 U. S. 503, 514 (1963).

to note here that such factors as detention incommunicado, delay in arraignment and protracted questioning,[113] as well as a "weighing * * * the circumstances of pressure against the power of resistance of the person confessing"[114] the complete absence of family, friends or counsel[115] and arrest or detention in violation of state laws[116] have been held to be instrumental, if not determinative. And confessions surrounded by these factors have been struck down despite the relative shortness of the period of detention[117] or the maturity, intelligence or sophistication, so far as police experience is concerned, of the suspect.[118]

In the total circumstances of the case at bar, considering the mentality and emotional instability of the petitioner, the illegality of the arrest and detention, the deceit and pressure applied by the interrogating officers, the failure to bring petitioner before a magistrate until after confession was obtained, the solitary confinement and incommunicado detention, a pattern of coercion surrounding the confession has been amply demonstrated.

Even before *Escobedo* and *Miranda* there was abundant authority to suggest that, under particularly oppressive circumstances, the in-custody interrogation of an accused in the absence of counsel was a denial of the right

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[113] *Fikes v. Alabama*, 352 U. S. 191 (1957).

[114] *Id.*, at 197.

[115] *Blackburn v. Alabama*, 361 U. S. 199 (1959).

[116] *Watts v. Indiana*, 338 U. S. 49 (1949); *Turner v. Pennsylvania*, 338 U. S. 62 (1949).

[117] *Payne v. Arkansas*, 356 U. S. 560 (1958) (three days); *Spano v. New York*, 360 U. S. 315 (1959) (eight hours).

[118] *Haynes v. Washington*, 373 U. S. 503 (1963).

to counsel under the Sixth Amendment,[119] as well as a violation of the self-incrimination clause of the Fifth or the "coerced confession" rule of the Fourteenth.

Although the majority of the Court in *Crooker v. California* [120] and *Cicenia v. Legay* [121] held that there was no separate constitutional right to counsel during in-custody interrogation, its underlying basis for so deciding was the special circumstances rule of *Betts v. Brady,*[122] since abrogated by *Gideon v. Wainwright.*[123]

In a concurring opinion in *Spano v. New York,*[124] a capital case, Justice Stewart, concurring,[125] noted:

> "At every stage in [the] proceedings the accused has an absolute right to a lawyer's help if the case is one in which the death sentence may be imposed." [126]

It is therefore urged that in a capital case the right to counsel was available to the accused during interrogation at the police station even prior to *Escobedo v. Illinois* [127] and that the failure to supply it under the oppressive circumstances here was yet an alternate and separate ground for suppression of the confessions.

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[119] As applied to the states through the Fourteenth. *Gideon v. Wainwright,* 372 U. S. 335 (1963).

[120] 357 U. S. 433 (1958).

[121] 357 U. S. 504 (1958).

[122] 316 U. S. 455 (1942).

[123] 372 U. S. 335 (1963).

[124] 360 U. S. 315 (1959).

[125] Joined by Black, Brennan and Douglas, *JJ.* Since Mr. Chief Justice Warren had already dissented from the contrary holding in *Crooker v. California,* 357 U. S. 433 (1958), the quoted language of Mr. Justice Stewart in the text represents a majority view of the Court at that time.

[126] 360 U. S. at 327.

[127] See lucid discussion of this contention in Herman, The Supreme Court and Restriction on Police Interrogation. 25 Ohio St. L. J. 449, 481-485 (1964).

B.

Since Confessions Were Obtained During Illegal Detention Following Unlawful Arrest, They Must Be Excluded as Derivatives of an Illegal Arrest.

It is here contended that, quite apart from the argument that the totality of circumstances demonstrates a due process violation and a denial of the right to counsel, the illegality of the arrest and subsequent detention, during which the interrogation of the petitioner was accomplished and his confession was obtained, compels the exclusion of the confessions as derivative of the unlawful arrest.

In *Wong Sun v. United States*,[128] this Court held that confessions obtained as derivatives of an unlawful arrest in violation of the Fourth Amendment were suppressible under the exclusionary rule.

In a *per curiam* decision shortly thereafter, *Traub v. Connecticut*,[129] the application of the *Wong Sun* rule to the states was established.

In *Traub*, after the state courts had rejected an appeal of an arson conviction on the ground that a confession had been elicited during illegal detention following an unlawful arrest, this Court vacated the judgment and remanded the case for reconsideration in the light of *Wong Sun* and *Ker v. California*.[130]

Petitioner submits that the illegality of the arrest under both state law[131] and federal constitutional principles[132] invalidates the confessions obtained during the in-custody interrogation which followed as a consequence

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[128] 371 U. S. 471 (1963).

[129] 374 U. S. 493 (1963).

[130] 374 U. S. 23 (1963).

[131] See argument *infra*, p. 57, f. n. 144.

[132] See argument *supra*, pp. 33-39.

of the arrest. The imperatives of the Fourth Amendment and the exclusionary rule, both commands upon the states,[133] require no less.

C.

Confessions, Induced in Part By Confrontation of Petitioner With Illegally Seized Evidence, Must Be Excluded As Fruits of Illegal Search and Seizure.

Petitioner contends that there are further Fourth Amendment implications than those urged in argument (B) *supra*, pp. 54-55 which compel suppression of the confession here in issue. Quite apart from the illegality of the arrest and detention which produced the confessions, petitioner was confronted with the bloodstained clothing which had been seized from his home as the fruit of an illegal search; since the confessions at least partially resulted from such confrontation, the confessions themselves became fruits of the illegal search and, therefore, suppressible under the exclusionary rule.

In *Wong Sun v. United States*,[134] this Court established that Fourth Amendment considerations were relevant to the admissibility of confessions. Recognizing that a Fourth Amendment violation may result in verbal as well as physical derivative evidence,[135] the Court held that confessions obtained as a consequence of an arrest which violated the Fourth Amendment must be suppressed by operation of the exclusionary rule. The applicability of this decision to state criminal prosecutions has been previously discussed.[136]

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[133] *Mapp v. Ohio*, 367 U. S. 643 (1961).

[134] 371 U. S. 471 (1963).

[135] *Silverman v. United States*, 365 U. S. 505 (1961).

[136] See argument IV (B) *supra*, pp. 54-55.

Although petitioner has discovered no decisions of this Court which have suppressed confessions resulting from illegal search and seizure, as distinguished from unlawful arrest, the logical symmetry of the Fourth Amendment requirements in both instances is unmistakable.

Some state and federal courts have already held that a confession obtained after interrogating officers confronted the accused with articles seized in an illegal search must be suppressed under the Fourth Amendment exclusionary rule.[137] It remains for this Court to do the same.

D.

Confessions Resulting From Unnecessary Delay in Arraignment in Violation of State Law Are Inadmissible in Evidence.

Petitioner here contends that, since his confession was obtained by in-custody interrogation during a period of detention resulting from failure of the arresting officers to bring him before a magistrate without unnecessary delay, such illegal detention taints the confession to such an extent that it must be suppressed.

As a function of its supervisory power over the federal courts, this Court has fashioned a broad rule of exclusion of confessions in federal prosecutions. In *McNabb v. United States*[138] and *Mallory v. United States*,[139] the Court held confessions inadmissible if ob-

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[137] E.g., *People v. Rodriguez*, 11 N. Y. 2d 278, 183 N. E. 2d 651, 654 (1962); *McNear v. Rhay*, 65 Wash. 2d 530, 398 P. 2d 732, 739 (1965); *Takahashi v. United States*, 143 F. 2d 118, 122 (9th Cir. 1944). And see concession on this point in the Brief of the Government, pp. 45-46, in *Wong Sun v. United States*, 371 U. S. 471 (1963).

[138] 318 U. S. 332 (1943).

[139] 354 U. S. 449 (1957) (ten hours elapsed between arrest and confession).

tained during an illegal detention resulting from the failure of the arresting officer to bring the prisoner promptly before a magistrate for arraignment pursuant to the requirements of the Federal Rules of Criminal Procedure.[140]

Although this Court has not yet held the *McNabb-Mallory* rule to be of constitutional import, and therefore binding upon the states by virtue of the due process clause of the Fourteenth Amendment, it has been suggested that the implications of *Wong Sun v. United States*[141] compel such a holding.[142] For if, as *Wong Sun* teaches, an *arrest* in violation of the Fourth Amendment taints confessions obtained pursuant to such arrest, it follows that confessions obtained as a consequence of *illegal detention* are similarly contaminated by infringement of that same constitutional authority.[143]

In the instant case, despite Ohio statutory requirements[144] identical to Rule 5(a) of the Federal Rules of Criminal Procedure, petitioner was detained in custody for more than 76 hours without charge. Although he was intensively questioned during this period, he denied implication in the murder for more than 71 of these hours.

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[140] Rule 5(a), Federal Rules of Criminal Procedure: "An officer making an arrest * * * shall take the arrested person *without unnecessary delay* before the nearest available commissioner * * *." (Emphasis supplied.)

[141] 371 U. S. 471 (1963).

[142] See Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 Neb. L. Rev. 483 (1963).

[143] It cannot be denied at this late date that both illegal arrests and detention for excessive periods are both unreasonable seizures of the person in violation of the Fourth Amendment.

[144] Ohio Revised Code, Sec. 2935.05, reads, in pertinent part:

"When a [law enforcement officer] has arrested a person without a warrant, he shall, *without unnecessary delay* take the person arrested before a court or magistrate * * *." (Emphasis supplied.)

The record demonstrates that the delay in arraignment was not necessary for any valid purpose. During this period and before any confession was obtained, court was open, a magistrate was available, and, if the arresting officers had elected to do so, petitioner could have been charged and arraigned before his confession. Furthermore, after a confession satisfactory to the interrogating officers had been obtained, they lost no time in charging petitioner with first degree murder, even though the court house had been closed to the public for some time.

The juxtaposition of these facts leaves little doubt that petitioner was deliberately held incommunicado without charge for the sole purpose of extracting a confession from him. And it is equally clear that, but for the illegally extended detention, his confession would not have been obtained at all.

Thus, this case provides an abundant opportunity for this Court to apply the *McNabb-Mallory* rule of exclusion of confessions to the states as a command of the due process clause of the Fourteenth Amendment—a rule whose constitutional stature has been long overdue.

V.

PETITIONER HAS NOT UNDERSTANDINGLY, KNOWINGLY AND DELIBERATELY WAIVED HIS FEDERAL CONSTITUTIONAL RIGHTS.

In this capital case, the Ohio Supreme Court has sought to avoid its responsibility of deciding the important questions of arrest, search and seizure and confessions discussed in Arguments III and IV, *supra*, pp. 31-58, by an alternate holding (after dismissing these constitutional issues rather summarily on their merits) that petitioner has waived them by his own conduct. In what has become its traditional judicial behavior, the court of last resort in

Ohio has found the doctrine of waiver to be a convenient tool to avoid implementing the criminal due process decisions of this Court.[145]

After defense objection at the trial to the admission of the illegally seized evidence, and after the same objection was assigned as error in the Ohio Supreme Court and dealt with there on its merits, that court observed that the defense failed to preserve the issues of arrest and search and seizure for review because "[t]here was * * * no reason for not raising the question * * * by motion to suppress prior to trial or objection at trial" [146] and because "several of the items allegedly seized illegally were introduced in evidence by defendant and he identified several of the State's exhibits on direct examination." [147]

After defense objection during the State's case in chief to prosecution testimony as to oral confessions made by petitioner, after the issue was urged by the defense and considered on its merits in both the Court of Appeals and Ohio Supreme Court opinions, the latter court noted that, since the petitioner had testified during the case for the

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[145] E.g., *Brookhart v. Janis*, 384 U. S. 1 (1966). Note also the Ohio Supreme Court's general reluctance to follow this Court's explicit commands. Cf. *Doughty v. Sacks*, 173 Ohio St. 407, 183 N. E. 2d 368, vacated and remanded sub nom. *Doughty v. Maxwell*, 372 U. S. 781 (1963); *Doughty v. Sacks*, 175 Ohio St. 46, 191 N. E. 2d 727, reversed sub nom. *Doughty v. Maxwell*, 376 U. S. 202 (1964); *State v. McLeod*, 173 Ohio St. 520, 184 N. E. 2d 101, vacated and remanded, 378 U. S. 582 (1964); *State v. McLeod*, 1 Ohio St. 2d 60, 203 N. E. 2d 349, reversed, 381 U. S. 356 (1965). See also *State v. Arrington*, 2 Ohio St. 2d 172, 207 N. E. 2d 557 (1965); *State v. Arrington*, 3 Ohio St. 2d 61, 209 N. E. 2d 207 (1965); *State v. O'Connor*, 177 Ohio St. 181, ___ N. E. 2d ____, vacated and remanded, 382 U. S. 286 (1965); *State v. O'Connor*, 6 Ohio St. 2d 169, 217 N. E. 2d 685 (1966); *State v. Bernius*, 177 Ohio St. 155, 203 N. E. 2d 241, 243 (1964).

[146] *State v. Woodards*, 6 Ohio St. 2d 14, 215 N. E. 2d 568, 575 (1966).

[147] *Ibid.*

defense to facts which differed from the alleged confessions only in such details as (a) whether the victim's death was accidentally or deliberately caused and (b) whether the sexual intercourse which preceded the victim's death was voluntary or involuntary on her part,[148] "he waived any objection he might have made to the testimony of the prosecutor's witness with regard to the confessions * * *."[149]

It is petitioner's contention that (A) the arrest, search and seizure issues were adequately preserved in the trial court; (B) the confession issues were adequately preserved in the trial court as well; (C) both issues must be presumed to have been preserved because of appellate consideration of these questions on the merits; and (D) an independent examination of the record compels the conclusion that petitioner did not knowingly and deliberately waive his federal constitutional rights.

A.

The Arrest, Search and Seizure Issues Were Adequately Preserved.

While it is true that no motion to suppress illegally seized evidence was filed in advance of trial, objection to its introduction into evidence was interposed by the defense at the trial. Until it was offered at the trial, defense counsel was unaware that the evidence had been seized from petitioner's house, or that the prosecution planned to introduce it.[150] Accordingly, it is apparent that defense counsel, taken by surprise, raised the issue at the earliest

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[148] Rather significant differences in a trial in which the accused was charged with rape and murder.

[149] *State v. Woodards*, 6 Ohio St. 2d 14, 215 N. E. 2d 568, 574 (1966).

[150] R. 485.

possible time. Under such circumstances no motion to suppress is necessary.[151]

Moreover, the Ohio Supreme Court's view that petitioner had waived his objection to the illegal arrest, search and seizure because he offered some of the seized items in evidence himself and identified them *after his objection to their introduction had been overruled,* is totally indefensible. This is not a case of permissible use of illegally seized evidence to impeach the credibility of the testimony of the accused.[152]

Here the prosecution offered the disputed evidence over the objection of the defense during its own case and before the petitioner had done anything to justify its use for impeachment purposes. Petitioner's subsequent testimony and offer of additional items must be classified as responsive only—an attempt to mitigate the damage done by the court's earlier erroneous admission of the evidence. It cannot be the law that an accused on trial for his life must elect, at his peril, between making the best presentation to the jury he can muster and preserving a clear record. Where the prosecution induces the use of illegally seized evidence, the defense of such use on grounds of impeachment is not available.[153]

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[151] See *Gouled v. United States,* 255 U. S. 298 (1921): "* * * where * * * it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission * * * and to consider and decide the question as then presented. * * *

A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." Accord: *Agnello v. United States,* 269 U. S. 20 (1925); *Amos v. United States,* 255 U. S. 313 (1921); *Bock v. Cincinnati,* 43 Ohio App. 257 (1931).

[152] *Walder v. United States,* 347 U. S. 62, 66 (1954); *cf. Agnello v. United States,* 269 U. S. 20 (1925).

[153] *Agnello v. United States,* 269 U. S. 20 (1925).

B.

The Confession Issues Were Adequately Preserved.

The Ohio Supreme Court has suggested that petitioner's election to take the stand in his own defense to rebut, insofar as he could, the damaging effect of evidence of his confessions somehow constitutes a waiver of his constitutional objections to their admission. Such a notion would be ludicrous but for the realization that while petitioner stands condemned to death, such specious reasoning blocks adequate review of one of the serious defects in his trial.

Piously incanting that "[d]ue process of law does not require that defendant be permitted to give his version of the event while having previous statements which he made excluded from the trial," [154] the Ohio court of last resort fails to recognize that the prosecution introduced the confessions *over timely defense objection* during its own case, before petitioner took the stand in his own defense. If the court had refused to admit the confessions in evidence at that time, one can only speculate what might have occurred during the balance of the trial. Perhaps petitioner would not have elected to testify in his own behalf, in order to avoid the devastating cross-examination and rebuttal testimony which inexorably followed his testimony. Perhaps the defense would have spent more effort in cross-examining the fingerprint expert for the prosecution, or produced expert testimony of its own, if the proof of petitioner's presence in the decedent's house at the time of her death had been less clear. The possibilities are endless. It will not do, however, to suggest that a finding of non-waiver on these facts would allow petitioner to testify to his version of the facts with-

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[154] *State v. Woodards*, 6 Ohio St. 2d 14, 215 N. E. 2d 568, 574 (1966).

out fear of impeachment. For, assuming suppression of the confessions, if petitioner had elected to testify as he did, all of the prosecution witnesses could quite properly have testified on rebuttal.[155]

The evil in the conception of the Ohio Supreme Court is that, upon an erroneous ruling at the trial admitting the devastating confessions, that judicial body would require the accused to stand mute, secure in the knowledge that his appellate record was pure, or attempt to rebut the confessions, all the while waiving his constitutional right to attack the confessions on appeal. Any humane doctrine of waiver cannot compel such a cruel choice.

Moreover, even the participants at the trial knew that defense objection to the confessions remained a vital issue in the case after petitioner's testimony, for the court so charged the jury without objection from the prosecution.[156]

The after-the-fact justification of a tainted trial by the Ohio Supreme Court will not bear close analysis.

C.

Appellate Review of the Merits of These Issues Creates an Irrebuttable Presumption That They Were Properly Preserved.

It has already been pointed out that the Court of Appeals opinion in this case disposed of the merits of the issue of admissibility of the disputed confessions and that the Ohio Supreme Court opinion discussed (summarily and incorrectly, in petitioner's view) the merits of both the confessions and arrest, search and seizure issues, before deciding that petitioner had waived them all.

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[155] *Walder v. United States*, 347 U. S. 62, 66 (1954).

[156] R. 1126-1127.

It is here contended that this appellate treatment of these issues on their merits creates an irrebuttable presumption that these federal questions were timely and properly raised in the state courts.[157]

D.

Petitioner Did Not Waive His Federal Constitutional Rights Under the Federal Doctrine of Waiver.

This Court has most recently made it abundantly clear that "[t]he question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law."[158] The federal standard of waiver has been sufficiently articulated so that some guide lines are available.

> "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. *Aetna Ins. Co. v. Kennedy,* 301 U. S. 389; *Ohio Bell Telephone Co. v. Pub. Util. Comm.,* 301 U. S. 292." [159]

As a consequence of this presumption of non-waiver, the Court has held that "[p]resuming waiver from a silent record is impermissible." [160]

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[157] *Raley v. Ohio,* 360 U. S. 423, 436 (1959); *Whitney v. California,* 274 U. S. 357, 360-361 (1927); *Manhattan Life Ins. Co. v. Cohen,* 234 U. S. 123, 134 (1914); *Chambers v. B. & O. R. Co.,* 207 U. S. 142 (1907).

[158] *Brookhart v. Janis,* 384 U. S. 1 (1966); See also *Henry v. Mississippi,* 379 U. S. 443, 447 (1965): "* * * we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question."

[159] *Glasser v. United States,* 315 U. S. 60, 70 (1942).

[160] *Carnley v. Cochran,* 369 U. S. 506, 516 (1962).

Mr. Justice Murphy, speaking for the Court in *Glasser v. United States*[161] demonstrated the vigor of the federal presumption against waiver by imposing an affirmative duty upon the trial court:

> "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right to jury trial for an accused, Mr. Justice Sutherland said that such duty 'is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.' *Patton v. U. S.*, 281 U. S. 276, 312-313."

In the leading federal case of *Johnson v. Zerbst*,[162] Mr. Justice Black, speaking for the Court, defined waiver as "an intentional relinquishment or abandonment of a known right or privilege," and that definition has been transported into review of state prosecutions.[163]

It is only when an accused, represented by counsel, "understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in state courts, whether for strategic, tactical, or any other reasons that can verily be described as the deliberate by-passing of state procedures,"[164] that this Court will find the unambiguous waiver that the *Johnson v. Zerbst* definition requires. But in applying this test, Mr. Justice Brennan, speaking for the Court in *Fay v. Noia*,[165] cautioned:

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[161] 315 U. S. 60, 71 (1942).

[162] 304 U. S. 458, 464 (1938).

[163] *Brookhart v. Janis*, 384 U. S. 1 (1966).

[164] *Fay v. Noia*, 372 U. S. 391, 439 (1963).

[165] *Ibid.*

"At all events we wish it clearly understood that the standard here put forth depends on *the considered choice of the petitioner*. Cf. *Carnley v. Cochran*, 369 U. S. 506, 513-517; *Moore vs. Michigan*, 355 U. S. 155, 162-165. *A choice made by counsel not participated in by the petitioner does not automatically bar relief*. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question. E.g., *Rice v. Olson*, 324 U. S. 786." (Emphasis supplied.)

In *Henry v. Mississippi*,[166] the Court applied the habeas corpus rule of waiver announced in *Fay v. Noia*[167] to direct appeals from state prosecutions. In the course of his opinion for the Court, Mr. Justice Brennan suggested that the State has the burden of showing that conduct by the accused or his counsel which might otherwise be insufficient to show waiver was prompted by litigation strategy.[168]

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[166] 379 U. S. 443 (1965).

[167] 372 U. S. 391 (1963).

[168] 379 U. S. 443, 450, f. n. 7 (1965). In view of the fact that an Ohio statute gives broad discretion to appellate courts to review denials of constitutional rights not raised below, Ohio Revised Code, Sec. 2505.21, Mr. Justice Black's views, dissenting, are pertinent:

"Nor do I believe that Mississippi's procedural rule concerning the stage of a trial at which constitutional objection should be made is the kind of rule that we should accept as an independent, adequate ground for the State Supreme Court's refusal to decide the constitutional question raised by petitioner. In *Williams v. Georgia*, 349 U. S. 375, this court held that where a State allows constitutional questions to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. * * *" 379 U. S. at 455. (Dissenting opinion.)

Whatever standard of waiver the Ohio Supreme Court employed to find that petitioner's conduct prevented him from asserting his federal constitutional rights, it is clear that it did not apply the federal standard enunciated above.

The record is completely barren of any showing that petitioner knowingly and consciously and intentionally waived any of the arrest, search and seizure or confession issues here asserted; it is similarly silent as to any litigation strategy which might have motivated petitioner's counsel to by-pass state procedures. Nor is it easy to imagine any tactical reason for intentionally allowing in evidence testimony of confessions from the lips of the petitioner of a most incriminating sort or blood-stained clothing of the petitioner of a most damaging and inflammatory nature.

On such a record in a capital case, it is incumbent upon this Court to hold that each of the federal constitutional questions here presented has not been waived by petitioner.

CONCLUSION.

This case arises out of ugly beginnings—a brutal and senseless death. It is a case in which the cry for vengeance is a natural response to the outrage of a frightened community and the frustrations implicit in society's continuing struggle to control criminal conduct.

It is precisely in such cases as this, however, that the interposition of constitutional protections between the accused and the mob are most needed—and most sorely tested. We have long since discovered that brutality and lawlessness as government responses to brutal and lawless conduct is not only destructive of society's moral image of itself, but inefficient and unwise as well. And so

it is vital that each sordid case—including this one—must evoke our most dispassionate analysis and our most thoughtful response.

Petitioner has demonstrated that from his first contact with the arresting officers through his trial and appeals, federal constitutional protections were denied him. He was illegally arrested. His home was illegally ransacked by police. He was illegally detained and illegally interrogated. Coerced confessions and illegally seized evidence were introduced in evidence against him. Although his sanity was in issue, the trial court kept the testimony and the consideration of the jury within the limitations of an arbitrary and unworkable standard of social responsibility. And now the ultimate loss of rights which government can impose upon an individual—taking his life—is scheduled to provide a fitting climax to the proceedings.

The State of Ohio, through its court system, as a part of a judicial insurrection which this Court ought not to tolerate, has sanctioned the emasculation of criminal justice which is here presented for review.

Grant of certiorari in the instant case will give the Court an opportunity to consider broad and novel questions of constitutional importance, and to correct an egregious blot on the landscape of criminal justice.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 476.

JOHN ELMER WOODARDS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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APPENDIX A.

OPINIONS AND ORDERS BELOW.

Opinion of the Supreme Court of Ohio, Case No. 39,248.

Syllabus by the Court.

1. Where, during the investigation of a crime, a person not yet charged with the commission of such crime is informed prior to being interrogated by a deputy sheriff and an assistant prosecutor that he is not required to make any statement, and that any statement which he might make may be used against him, and where he has not requested that counsel be provided, such person has not been denied the assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

2. Ordinarily, in an appeal in a criminal case, no claim of error may be predicated upon alleged irregularities in the proceedings at the trial where defendant knew of such alleged irregularities in sufficient time to bring them to the attention of the trial court, or where defendant, at his trial, has acted in a manner inconsistent with the position taken upon appeal with regard to such alleged irregularities.

3. The fact that a person selected to serve as a juror at the trial of one charged with murder in the first degree is acquainted with the sheriff and a deputy sheriff who was a witness for the prosecution and has procured an insurance policy for that witness does not prejudice defendant's right to a fair and impartial trial, where the opportunity was present for defendant's counsel to ascertain this fact, and where there is no evidence that the juror was prejudiced against the defendant by reason of such acquaintance.

4. The admission into evidence of statements in a death certificate or a coroner's report that the decedent

was beaten by an unknown assailant or that there was extensive beating involving the entire body does not constitute prejudicial error, where there is testimony as to the condition of decedent's body at the time of death and as to the cause of death, and where such statements in the documents do not connect the defendant with the death of the decedent. (*Carson v. Metropolitan Life Ins. Co.*, 156 Ohio St. 104, 100 N. E. 2d 197, distinguished.)

On Saturday, July 13, 1963, Margaret Van Arsdale, a woman 85 years of age, was discovered dead in the utility room of her home in Columbia Station, Ohio. A blanket was wrapped around her body and tied with her nightclothes and underclothes.

An autopsy showed that all her ribs had been broken, her spleen ruptured and her perineum and vaginal wall torn. She had suffered injuries to her head, left forearm, right hand and other parts of her body.

About noon on July 13, 1963, two sheriff's cars were dispatched to the residence of John Woodards, a former tenant of the victim. No one was at home. A deputy entered the house and took a pair of work boots which he placed in his car. Shortly thereafter, Woodards arrived and was arrested by the officers. He was informed that he was wanted for questioning in connection with a gas station robbery which had occurred the night before.

One of the deputies accompanied Woodards into his house where Woodards identified and gave to the deputy the clothes which he said he had been wearing the night before. He was then taken to the county jail. The deputy later returned for more clothing which Woodards' wife gave him.

Woodards was questioned briefly, was fingerprinted on July 13 and was held in jail on Monday, July 15, at

about 1:15 p.m., he was questioned for the first time concerning the murder of Mrs. Van Arsdale. At that time, he was informed by a deputy sheriff that he was not required to make any statement and was advised by an assistant prosecutor of his federal and state constitutional rights, including the fact that any statement he might make could be used against him.

The deputy in charge of the interrogation read to Woodards from a book on the subject of sexual deviations of older women and asked him whether he did not want to relieve the load on his shoulders. Woodards then made a statement which the court reporter transcribed. He agreed to go to the Van Arsdale residence and re-enact the incident. During the drive to and from the scene, he was questioned, and the questions and answers were taken down in shorthand by a deputy sheriff. Upon their return to the jail, Woodards was taken before a magistrate at the Elyria Municipal Court and charged with first degree murder. On July 16, he was represented by counsel, waived preliminary hearing and was bound over to the Grand Jury.

On July 23, he was indicted for first degree murder, arraigned on July 26, at which time he was represented by counsel, and pleaded not guilty.

Prior to trial, Woodards was twice examined at Lima State Hospital and was found to be legally sane.

At his trial before a jury, Woodards testified in his own behalf as to the events which took place on the night of July 12, 1963.

His testimony was that he had previously been a tenant in the upstairs apartment of Mrs. Van Arsdale's house, and, after he and his wife had moved, he had periodically returned to visit Mrs. Van Arsdale. He testified that upon several previous occasions he had had sexual intercourse with her.

He testified that on July 12, 1963, he had been away from home all day and had drunk several beers and some wine during the course of the day. In the evening he went to several bars and drank approximately 17 bottles of beer.

He stated further in his testimony that at about 1:00 a.m. he decided to return home and on his way he passed the Van Arsdale residence. He noticed that the lights were on and decided to stop. He parked his car in a field about a quarter of a mile down the road, walked back to Mrs. Van Arsdale's home and knocked on the door. He testified that Mrs. Van Arsdale admitted him. He stated that they talked for a few minutes. He said that he then helped her onto the kitchen table and they had intercourse. The table tipped, and both he and Mrs. Van Arsdale fell on the floor. He testified that he put out his elbows to break the fall and they hit her chest. He stated that he became frightened and got up immediately and put the table back in place. According to his testimony he then picked Mrs. Van Arsdale up and carried her into the living room to see whether she was hurt. After this, he dragged her into the utility room, wrapped her in a blanket and tied it around her with her nightclothes and underwear. He left the premises, went home and went to bed.

He testified that he did not injure her purposely or wilfully, and that he did not realize that she was dead when he left.

On the witness stand he stated that the next morning he went shopping with his wife. He remembered nothing of the night before and did not, in fact, remember what had happened until July 15th when he was questioned.

The jury convicted him of murder in the first degree without recommendation of mercy.

The trial court denied defendant's motion for new trial.

Upon appeal, the Court of Appeals affirmed the judgment of conviction.

This cause is before this Court upon an appeal as of right and upon the allowance of a motion for leave to appeal.

O'NEILL, *Judge.*

Errors are assigned as follows:

(1) Two purported confessions of defendant were obtained in violation of his right to the assistance of counsel and were improperly used against him at trial.

(2) Various items were seized incident to an invalid arrest and were improperly admitted into evidence.

(3) Defendant was forced to wear handcuffs and body belt during the trial and was heavily guarded, and the trial court failed to keep order during the course of the trial.

(4) The foreman of the jury failed to reveal on *voir dire* that he was the insurance agent of the sheriff and of a deputy sheriff who was a witness for the prosecution.

(5) Certain items other than those obtained as the result of an unreasonable seizure were improperly admitted into evidence.

(6) Inflammatory statements and the use of items not introduced into evidence were improperly permitted by the trial court during the summation by the prosecutor.

(7) The jury was erroneously charged on the lesser included offense of manslaughter.

(8) The trial court refused to define the word, "psychopath," after the jury had requested such definition.

The first assignment of error is based upon an alleged denial to the defendant of his right to counsel under the

Sixth and Fourteenth Amendments to the United States Constitution.

In Section 2935.14, Revised Code, it is provided in part:

> "If the person arrested is unable to offer sufficient bail or, if the offense charged be a felony, he shall, prior to being confined * * * be speedily permitted facilities to communicate with an attorney at law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel * * *."

In *Escobedo v. State of Illinois,* 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, the United States Supreme Court held that where an investigation had focused upon a particular suspect who had been taken into custody and interrogated in a manner lending itself to incriminating statements, where the accused had requested and been denied an opportunity to consult with counsel, and where he had not been effectively warned of his right to remain silent, he was improperly denied "the assistance of counsel" to which he was constitutionally entitled.

Under Ohio law, the accused must be permitted to communicate with counsel or a relative, or the officers must contact someone for him for the purpose of obtaining counsel irrespective of whether the police effectively warn him of his absolute right to remain silent. *City of Toledo v. Dietz,* 3 Ohio St. 2d 30, 209 N. E. 2d 127, certiorari denied, 382 U. S. 956, 86 S. Ct. 432, 15 L. Ed. 2d 360.

It appears from the record that the defendant did not request counsel and was not denied an opportunity to consult with counsel. It appears further from the record that he was advised by an assistant prosecutor and by the deputy in charge of the interrogation that he was not required to make any statement, and that any statement he might make could be used against him.

The defendant, when he testified in his own behalf, did not controvert the testimony of three deputy sheriffs to this effect. Since the defendant testified that he had gone to the victim's home and had intercourse with her, and that she had been injured when the two of them fell from a table, he waived any objection he might have made to the testimony of the prosecutor's witness with regard to the confessions which he made while he was being interrogated prior to being charged with murder. *Blanchard v. State* (Miss.), 184 So. 66; *State v. O'Neal,* 210 S. C. 305, 42 S. E. 2d 523; *State v. Smith,* 140 Me. 255, 274, 37 A. 2d 246; *Jordon v. Maxwell, Warden,* 3 Ohio St. 2d 115, 209 N. E. 2d 213; *Wigmore on Evidence* (3 Ed.) 129, Section 18, note 35; *McCormick on Evidence,* 344, Section 55. Contra, *Commonwealth v. Noble,* 371 Pa. 138, 146, 88 A. 2d 760.

He also introduced the testimony of his own doctor, who repeated what defendant had told him concerning what happened when he went to Mrs. Van Arsdale's home during the night of July 12.

Due process of law does not require that defendant be permitted to give his version of the event while having previous statements which he made excluded from the trial.

Defendant assigns as error the introduction into evidence of several articles of clothing allegedly seized illegally by the deputy sheriff who went with him into his home. The claim is not that the search was unreasonable, but rather that it was not incident to a valid arrest. The assertion of invalidity is based upon the lack of probable cause for arrest, the failure to obtain a warrant, and the failure to inform defendant of the charge against him.

An arrest under Ohio law and under the United States Constitution must be based upon reasonable cause or

probable cause. Section 2935.04, Revised Code; *Beck v. State of Ohio*, 379 U. S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142. In *Beck, supra*, at page 96, 85 S. Ct. at page 228, the court stated:

> "When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed." These facts must not be from so vague and untested a source as would require a judicial officer to deny the warrant. *Wong Sun v. United States*, 371 U. S. 471, 479, 83 S. Ct. 407, 9 L. Ed. 2d 441.

Under certain circumstances, a warrant need not be obtained in order to render an arrest valid. The arresting officer must have probable cause to believe that a felony was committed by defendant, and the circumstances must be such as to make it impracticable to secure a warrant. *Johnson v. United States*, 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436; *Jones v. United States*, 357 U. S. 493, 499, 500, 78 S. Ct. 1253, 2 L. Ed. 2d 1514; *Chapman v. United States*, 365 U. S. 610, 615, 81 S. Ct. 776, 5 L. Ed. 2d 828.

In the instant case, the officers had probable cause to suspect the defendant of the offense which had been committed. It was within their knowledge that (1) the assailant must have been known to the victim, since there was no sign of forcible entry; (2) it was an offense of a violent nature; (3) the defendant was known to the victim, having rented her upstairs apartment and had a previous record, including sexual offenses; and (4) he was a large and powerful man and was known to have a violent temper.

This was not the untested hearsay statement of an unreliable informant but was based upon personal observation of the premises, conversation with the victim's

granddaughter, who had known the victim and the defendant, and the personal knowledge of the officers.

In this case, the failure to obtain a warrant was not unreasonable. The officers could not know whether defendant would attempt an escape. In fact, they knew that he had previously left the state to avoid arrest pursuant to a warrant and had not returned until the charges were dropped. Therefore, proceeding without a warrant was justified.

Defendant was not arrested for murder, but rather for robbery, and was not informed of the real charge against him. This point as well as the other purported illegalities in the arrest were not raised prior to or during the trial, or before the Court of Appeals.

Although this Court does have discretion to review a claimed denial of constitutional rights not raised below, under Section 2505.21, Revised Code, that discretion will not ordinarily be exercised to review such claims, where the right sought to be vindicated was in existence prior to or at the time of trial. *Mapp v. Ohio,* 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 and *Ker v. California,* 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726, which apply to the states federal standards of reasonableness and probable cause in determining the validity of arrests, searches and seizures, do not preclude the operation of reasonable state procedures. Those cases were decided prior to the trial of this case. There was, therefore, no reason for not raising the question of the validity of the arrest and the search and seizure by motion to suppress prior to trial or objection at trial.

It appears from the record that the only items which were the subject of a search and seizure at the time of the arrest were defendant's clothes, shoes and handkerchief. However, several of the items allegedly seized illegally

were introduced into evidence by defendant and he identified several of the state's exhibits on direct examination.

Since defendant did not raise this question at the first opportunity, in fact, introduced several of the items himself, and identified certain of the state's exhibits without objection, he may not now assert that this was to his disadvantage. *State v. Davis*, 1 Ohio St. 2d 28, 203 N. E. 2d 357.

Defendant alleges as error that the foreman of the jury did not reveal the full extent of his acquaintance with the sheriff and one of his deputies, a witness in this case.

On *voir dire*, the juror stated that he knew the sheriff and deputy Lois Carson casually, not personally, just by meeting them. After trial, it was learned that the juror had procured an insurance policy for the deputy. It appeared from affidavits of the juror and the deputy that the transaction took place by mail and telephone and was not the result of solicitation by the juror, and that affiants knew each other "casually."

It does not appear that there was any attempt on the part of the juror to conceal the nature of the relationship. He admitted knowing both the sheriff and the deputy. Counsel for defendant contends that the juror should have answered, "business," rather than, "casual," when he was asked the nature of his acquaintance with the sheriff and deputy. However, Section 2945.25, Revised Code, does not specify either "business" or "casual" acquaintance with a witness as a challenge for cause, and the fact that a juror is acquainted with a witness would not necessarily affect the juror's impartiality. See *People v. Wilkes*, 44 Cal. 2d 679, 284 P. 2d 481.

It is provided by Section 2945.27, Revised Code, that the court shall examine prospective jurors, with reasonable examination to be allowed to the prosecutor and

counsel for the defense. The nature of the relationship between a witness and a juror would seem to fall within the scope of reasonable examination, and counsel does not claim that there was any limitation on his right to examine the juror. Counsel has an obligation to help discover, by examination, those facts which would make a juror unsuitable to serve in a particular case.

Defendant alleges further as error that five muscular uniformed deputies guarded him, that he was forced to wear handcuffs fastened to a body belt during the trial, and that the trial court failed to keep order throughout the trial. The record indicates that there were five deputies discreetly stationed at various points in the courtroom, and that two of them were in plain clothes. There is nothing in the record to indicate that the trial was disorderly.

The record does, however, show that defendant was handcuffed throughout the trial, and that objection was made thereto prior to the commencement of the trial. Ordinarily a prisoner is entitled to appear free of shackles or bonds which would restrict his free movements. It is uniformly held, however, that the prisoner may be shackled when such precaution is shown to be necessary to prevent violence or escape. It lies within the discretion of the trial court to determine such necessity, based upon the conduct of the accused. An appellate court will not reverse the trial court's action except in case of an abuse of that discretion. *Tunget v. Commonwealth,* 303 Ky. 834, 198 S. W. 2d 785, certiorari denied, 331 U. S. 833, 67 S. Ct. 1514, 91 L. Ed. 1847; *State v. Coursolle,* 255 Minn. 384, 97 N. W. 2d 472, 75 A. L. R. 2d 755.

The trial court in the instant case ruled that the handcuffs and belt should not be removed, stating that it was up to the sheriff to decide. During the trial, evidence was

presented that, while defendant was confined in the county jail, a one-inch piece of hacksaw blade, a piece of old shirt used as a belt, a pencil, a metal cleat from his shoe, a key and a five-dollar bill were found in defendant's cell. Furthermore he pleaded not guilty by reason of insanity. These are valid reasons for refusing to unshackle the defendant during the trial. There was not an abuse of discretion on the part of the trial court.

Objection was timely made to the admission of the autopsy report and the death certificate into evidence. These documents were objected to on the ground, among others, that they contained conclusions and opinions of the person who filled them out as to the cause of death. In the death certificate, the conclusion to which objection was made was "extensive beating involving the entire body," and in the autopsy report, the objectionable statement was, "beaten by unknown assailant."

In *Carson v. Metropolitan Life Ins. Co.*, 156 Ohio St. 104, 100 N. E. 2d 197, 28 A. L. R. 2d 344, an insured died and beneficiaries brought suit to recover certain funds payable under a policy of life insurance. In case of suicide, the company was not obligated to pay. The issue was whether a coroner's report and death certificate containing conclusions and opinions as to the cause of death could be admitted into evidence.

The court held that while Section 2855-11, General Code (Section 313.10, Revised Code), makes the records of the coroner admissible, admissibility is limited to the facts contained therein. The court states, at page 114, 100 N. E. 2d at page 203:

> "* * * But, in the absence of any direct testimony as to suicide, an expression by a coroner or physician that a decedent committed suicide is a mere opinion and does not constitute a fact as con-

templated by the provisions of the statutes to which we have referred. That the admission of such opinions was prejudicial cannot be doubted."

In the instant case, there was extensive testimony, without objection, as to the cause of death. The deputy coroner who performed the autopsy on the body of the victim testified, without objection, that the injuries were caused by "external violence applied to multiple areas of the body." His opinion was that the injuries could not have been caused by one blow or by a fall or by defendant falling upon the victim. On cross-examination by defendant's counsel he testified that the injuries were produced by crushing blows with a critical localization of weight.

This was the professional opinion of one who had observed the body of the victim at great length. Such opinion was based upon examination of the condition of the body and the probability as to the cause of such condition. In *Carson, supra* (156 Ohio St. 104, 100 N. E. 2d 197), the opinion of the coroner in the coroner's report and death certificate went further than the opinion in the documents in this case. There, the opinion stated not only what caused the death, but who caused it. It was this latter aspect of the opinion which created the prejudice. In the instant case, since there was extensive testimony by witnesses, and since the documents did not name the assailant, their admission was not prejudicial error.

Objection was also timely made to the admission of 15 slides taken during the course of the autopsy. The rule is well settled that photographs and color transparencies are not objectionable so long as they are properly identified, are relevant and competent and are accurate representations of the scene which they purport to portray. Indeed, photographs frequently convey information to the court and jury more accurately than words. *Oliver v. State*, 225

Ark. 809, 286 S. W. 2d 17; *Vaca v. State*, 150 Neb. 516, 34 N. W. 2d 873.

Although a photograph may be rendered inadmissible by its inflammatory nature, the mere fact that it is gruesome or horrendous is not sufficient to render it inadmissible if the trial court, in the exercise of its discretion, feels that it would prove useful to the jury. *People v. Brubaker*, 53 Cal. 2d 37, 346 P. 2d 8; *People v. Jenko*, 410 Ill. 478, 102 N. E. 2d 783; *Commonwealth v. Novak*, 395 Pa. 199, 150 A. 2d 102.

The real question is whether the probative value of such photographs is outweighed by the danger of prejudice to the defendant. See *Wisnewski v. State*, 1 Storey 84, 51 Del. 84, 138 A. 2d 333. But see *People v. Jackson*, 9 Ill. 2d 484, 138 N. E. 2d 528; *Kiefer v. State*, 239 Ind. 103, 153 N. E. 2d 899.

This Court cannot say that the admission of the color slides prejudiced defendant's right to a fair trial or that the trial court abused its discretion in admitting them into evidence.

Defendant alleges as error the reference by the prosecutor to previous arrests and convictions of defendant. Evidence of previous convictions may be introduced for the purpose of impeaching credibility. Section 2945.42, Revised Code; *Harper v. State*, 106 Ohio St. 481, 140 N. E. 364.

This objection was waived by defendant by the introduction of the following testimony of his own expert witness, Dr. Friedman:

> "It was significant, and this we learned from him directly, that early in his development, at the age of 14 he had been arrested for robbery. I think he called it breaking and entering, but because of his youth, he was placed on probation at the time.

"There were also other arrests for various anti-social offenses, peeping tom activity, assaulting a girl, and so on. So that by the age of 17, he had already been arrested three or four times."

This illustrates defendant's previous record more clearly than any testimony elicited by the prosecutor.

Defendant complains that he was prejudiced by the following argument of the prosecutor in his summation to the jury:

"I have used this before, he is faking. Remember ladies and gentlemen of the jury, we have confidence in you that they will not be able to fraudulently present to you something that did not happen or that there is a different version of what actually happened."

And the prosecutor stated further:

"* * * Woodards is a misfit like a gangrenous leg on a diabetic body, like an inflamed, useless appendix that threatens the body, the body and the society of the state of Ohio.

"He caused a cruel, unnecessary death. He asks mercy from you. Yet, he showed none.

"Remove him from society like you would a parasite * * *."

In *State v. Muskus,* 158 Ohio St. 276, 109 N. E. 2d 15, 33 A. L. R. 2d 452, the court held that an appeal to the pecuniary interest of the jurors as taxpayers was improper and that the refusal of the trial court to sustain objections to such argument was prejudicial error. There the prosecutor appealed at length to the passions and prejudices of the jury in most inflammatory language. The language complained of here does not approach the scope or violence of the language used there.

Although the statements of the prosecutor were intemperate and might better have been left unsaid, some latitude and freedom of expression should be allowed. *People v. Allen*, 351 Mich. 535, 88 N. W. 2d 433. The jury should be given credit for sufficient common sense and sound judgment to discount the remarks made in this case. Likewise, there is nothing in the record to show that defendant thought the argument was improper at the time, since there was no objection to it.

During his summation, the prosecutor, arguing in support of the circumstantial evidence of rape, used, for purposes of demonstration, a bottle, a straw, a pen, a dowel, and a pair of calipers. These items had not been introduced into evidence and objection was made to their use. The court allowed their use for demonstration purposes only.

The cases in this area of visual aids not introduced into evidence deal primarily with the use of blackboards and charts. See *Affett v. Milwaukee & Suburban Transport Corp.*, 11 Wis. 2d 604, 106 N. W. 2d 274, 86 A. L. R. 2d 227; *Caley v. Manicke*, 24 Ill. 2d 390, 182 N. E. 2d 206.

It is difficult to perceive a substantial difference between a blackboard or chart and other graphic illustrations of an idea which is being legitimately advanced by counsel. It would be permissible for counsel to call upon the jury to imagine such an illustration, and there is no harm in allowing counsel to present his point in a more concrete manner.

The defendant claims that, in giving the charge on manslaughter, the trial court incorrectly stated the law, and that such error is prejudicial.

That portion of the charge about which defendant complains is as follows:

> "The law of Ohio says that whoever unlawfully kills another is guilty of manslaughter. The killing

may be either upon a sudden quarrel or unintentionally while the slayer is engaged in some unlawful act.

"You will observe that manslaughter need not be done purposely or maliciously and that the element of attempting to perpetrate rape is also lacking.

"If you are convinced beyond a reasonable doubt that the defendant unlawfully killed Margaret Van Arsdale, without purpose to kill her, without malice, and without attempting to perpetrate rape, then your verdict may be guilty of manslaughter."

This charge, because of its incompleteness and imprecision, is ambiguous and, therefore, erroneous. However, the majority of this Court is of the opinion that, upon the record and circumstances of this case, this charge was not prejudicial to the defendant.

The defendant makes no complaint concerning the charge of the court to the jury on first degree murder. The trial court instructed the jury that only if the jury found the defendant not guilty of murder in the first degree should it consider the lesser included offenses. The defendant makes no objection to this charge. The jury found the defendant guilty of murder in the first degree and the evidence in the record is sufficient to support such a jury verdict.

The syllabus of *State v. Loudermill*, 2 Ohio St. 2d 79, 206 N. E. 2d 198, is not applicable. In that case, both the defendant and the prosecutor requested a charge on the lesser included offense of manslaughter. In this case, no request was made by either party for a charge to be given upon the offense of manslaughter, and the defendant takes the position that the court was required by the evidence to give such a charge.

After the jury had retired to consider the verdict a note was sent to the trial judge requesting, among other

things, that he define the word, "psychopath." The judge referred the jury to the testimony of the doctors as they had given such definition. Counsel for the prosecution and the defense agreed to the answers which the court gave to the jury's questions. There can, therefore, be no claim of error predicated upon the trial court's answer to the jury.

This Court, finding no error in the record prejudicial to the rights of the defendant, affirms the judgment of the Court of Appeals.

Judgment affirmed.

TAFT, *C.J.*, and ZIMMERMAN, MATTHIAS, HERBERT, SCHNEIDER and PAUL W. BROWN, *JJ.*, concur.

OPINION OF THE COURT OF APPEALS FOR THE NINTH JUDICIAL DISTRICT OF OHIO, CASE NO. 1627.

Before: HUNSICKER, *Presiding Judge,* and DOYLE and [illegible]RTL, *Appellate Judges.*

HUNSICKER, *P.J.*

This is an appeal on questions of law from a judgment of guilty of murder in the first degree without recommendation of mercy, rendered on the verdict of a jury.

In midmorning of Saturday, the 13th of July, 1963, a neighbor of Margaret Van Arsdale found her lying dead on the floor of her home, located in Columbia Station, Lorain County, Ohio. Mrs. Van Arsdale was a widow eighty-five years of age, and of slight physical build; her weight was about one hundred pounds. She lived alone in the lower rooms of a house, the upper rooms of which were arranged for rental purposes.

The sheriff of Lorain County, Ohio, was notified by the neighbor who found the body. Several deputies were directed by radio to go to the home of Mrs. Van Arsdale, where they discovered the unclothed body of Mrs. Van

Arsdale wrapped in a blanket, her feet and body tied with some underclothing. The pantry, kitchen, and bedroom of the home were in disarray. Blood was on the bed; blood was on the kitchen table and floor; and blood was on the body and blanket.

The coroner was notified, and in response to that notification, one of his deputies came to the home, determined that Mrs. Van Arsdale was dead, and had her body removed to a hospital, where an autopsy was performed.

The autopsy showed a body that was severely beaten; all of the ribs were broken, the vaginal organs were torn, the spleen split into two parts; and injuries to the head, hands, and other parts of the body, were also found.

In the early afternoon of July 13, 1963, a former renter of the upstairs living quarters of the Van Arsdale home, (the appellant here, John Elmer Woodards), was taken into custody. On the 15th day of July, 1963, he gave a complete account of his entering the Van Arsdale home late on the night of July 12, or early in the morning of July 13. He was admitted to the home by Mrs. Van Arsdale, and, according to his story, proceeded to have, or attempted to have, sexual relations over the protests of Mrs. Van Arsdale. He said he tried the act on the bed but was not successful. He then carried his victim to the kitchen, and put her on a table from which she slipped, and then, falling with her to the floor, he continued his act. Noticing she was injured, he wrapped her in a blanket, tied her with some of her clothing, and then went to his home.

At his home, John Elmer Woodards (a two hundred pound, twenty-five year old man), slept soundly, lying next to his wife until midmorning, when he went shopping with her. Upon his return from the grocery store, he was requested to go with a deputy to the jail for questioning.

While there over Sunday, July 14, he was fingerprinted, but was not interrogated until the next day, a Monday, when he, (without coercion, threats, intimidation, promises, or physical abuse), told the story of the events of the previous Saturday. He was taken by the sheriff, and three deputies, to the Van Arsdale home to explain his story. He was told he need not give a statement, but, if he did, it could be used against him. He did not request a lawyer, although at the time set for the preliminary hearing in the Municipal Court of Elyria, Ohio, which hearing was waived, he had counsel of his own choice. From that time on, he was represented by counsel. He was continually in custody from the time he left his home with the deputy sheriff just after noon of July 13.

A lengthy trial resulted in the verdict and judgment set out above. From such judgment, an appeal was duly perfected to this court, wherein the following assignments of error are set forth:

"1. That the judgment of the Common Pleas Court as rendered on 1/31/64 and the order of the Common Pleas Court overruling appellant's Motion for a new trial rendered on 3/9/64 are contrary to law;

"2. That the judgment of the Common Pleas Court rendered on 1/31/64 and the order of the Common Pleas Court overruling appellant's Motion for a new trial rendered on 3/9/64 are against the manifest weight of the evidence;

"3. That the Common Pleas Court erred in overruling objections of appellant and in permitting the Sheriff of this county to keep appellant handcuffed and shackled throughout the entire conduct of this trial, to the prejudice of this appellant;

"4. That the Common Pleas Court erred in permitting the Prosecutor to introduce and to display to the jury colored autopsy slides of the postmortem as conducted by the Lorain County Coroner's office on

the body of Margaret Van Arsdale, to the prejudice of this appellant and his constitutional rights;

"5. That the Common Pleas Court erred in admitting the death certificate as prepared by the Lorain County Coroner without first deleting therefrom the Coroner's opinion as to the cause of death;

"6. That the Court erred in its charge to the jury, especially in charging and defining the included offense of manslaughter;

"7. That the Court erred in permitting the Prosecuting Attorney to present improper final arguments in which said Prosecuting Attorney used as demonstration certain physical items which had not been introduced as evidence and certain inflammatory remarks to the prejudice of the appellant;

"8. That the Court erred in failing to grant appellant's Motion for a new trial or to mitigate sentence for the reason that the jury failed to take into consideration the testimony of Drs. Friedman and Gill, to the effect that the appellant was psychopathic and the testimony that appellant was intoxicated in mitigation of the offense as charged;

"9. That the Court erred in failing to grant a new trial for the reason that one juror failed to reveal on voir dire examination that said juror was acquainted with and was the insurance agent for Deputy Lois Carson, who was an important witness for the prosecution;

"10. That the Court erred in failing to define the word 'psychopath' when especially requested by the jury during their deliberations, said word having been insufficiently defined in the Court's charge;

"11. That the Court erred in failing to grant appellant's Motion for a new trial for the reason that the essential element of intent was not proven beyond a reasonable doubt;

"12. That the Court erred in the admission of evidence over objection of appellant;

"13. That the Court erred in failing to maintain proper order during the trial of this cause and to control the conduct of the trial;

"14. That the Court erred in permitting the Sheriff at all times to keep at least five huge, uniformed deputies in obvious presence in the courtroom and surrounding appellant;

"15. That the Court erred in permitting the State to introduce evidence of other offenses of appellant having no relation to the offense for which appellant was on trial;

"16. That the indictment in this cause was defective in that it contained alternative allegations;

"17. Other errors manifested by the record."

First, we turn to assignment of error number three, and the claim that the appellant was prejudiced by being handcuffed throughout the trial. Counsel for Woodards, at the outset of the trial, requested the court to order the sheriff to remove the handcuffs, and unfasten the lock by which his handcuffs were attached to his belt. The trial judge said it was a matter of security which remained in the control of the sheriff.

The bill of exceptions shows that Woodards, after being in jail, secured from some unknown place a small piece of a hacksaw, a metal key which he attached to a string, and another small piece of metal. He said he found the piece of hacksaw, and metal, in the window well of the jail, and brought the key with him from Lima State Hospital. He also had pleaded guilty by reason of insanity. Under these circumstances, although the deputy sheriff may have been unduly fearful of an attempt to escape, which fear was shared by the judge, the keeping of Woodards handcuffed, in the light of all of the facts introduced in the case, cannot be called prejudicial to his rights.

The control of the proceedings during trial rests with the trial judge, and he must determine whether a prisoner who appears before him should remain manacled during trial. *State v. Farmer,* 90 O. App. 49. Any error committed by the trial judge in this regard was not prejudicial in the instant case.

With regard to appellant's claim of error respecting the keeping of "five huge, uniformed deputies" in the courtroom during the trial, and in failing to maintain proper order during the trial; we find no such matters exemplified in the bill of exceptions.

The introduction into evidence of other offenses was testified to by Mrs. Woodards, and by the appellant himself. This testimony concerning these offenses related to convictions for misdemeanors. No prejudicial error is found in the admission of such testimony herein.

The man who became foreman of the jury was inquired of, on voir dire, as to his acquaintance with the sheriff and one of his deputies. The juror said it was casual, and no further inquiry was made of this juror. After the trial, it developed that this juror had sold, at the request of the deputy, a liability insurance policy similar to one he had sold the sheriff. Later, this deputy testified to statements made by Woodards in her presence, and which she took by shorthand during a ride with him to the scene of the crime. Another deputy also testified to the same statement. There is nothing to show prejudice in the selection of this juror, or that his acquaintance with the deputy was other than what he said it was. If counsel had desired to find out how casual a "casual" acquaintance is, he could have inquired further. *Conrad v. Kerby,* 66 O. App. 359.

The jury in the course of their deliberations, requested, in writing, among other things, a definition of

"psycopath" (sic). One of the psychiatrists, in his testimony, was asked to give such definition, which he did. Other doctors who testified also gave a definition of "psycopath" (sic). The instructions of the trial judge to the jury were, at the request of the prosecutor, reduced to writing, and sent to the jury room. The trial judge told the jury, in answer to their request, to "recall the testimony of the medical doctors as they gave such definition." Under the circumstances here, the trial judge was bound by the provisions of Section 2315.01(G), Revised Code. No error prejudicial to the rights of the appellant is found here.

A psychotic person is not an insane person, as detailed by the doctors. The jury had before it a complete analysis of mental deviations and mental illnesses. We must assume they evaluated such testimony. There is no way to show they failed to consider it. Assignment of error number eight must be rejected.

Over objection, the trial court admitted as exhibits a number of colored photographs as slides which were displayed to the jury by projection upon a screen. These photographs were taken by one of the deputies, not a professional photographer; were developed by a professional photographer, and brought into court to show the scene of the crime immediately after the discovery of the body of the deceased Mrs. Van Arsdale, and the details of the autopsy. We find no prejudicial error here. The pictures of the autopsy were not necessary for a full understanding as to the cause of death; were gruesome, and in a measure, horrendous. The fact that the members of this panel of judges (all of whom were formerly trial judges), might not have permitted their introduction, does not make the admission an error which should be designated prejudicial.

A complete review of the medical findings was given orally and should have sufficed.

The autopsy report was admitted as an exhibit in the case. Such report bore a notation that the cause of the death of Margaret Van Arsdale was a severe beating. Of course, no one saw any of the acts which led to her death. This notation was mere opinion and should have been deleted from the coroner's report, which, under Section 313.10, Revised Code, is admissible as evidence as to the facts set out in his record. *Carson v. Metropolitan Life Ins. Co.*, 156 O. S. 104. However, this statement of opinion, notwithstanding its error in admission, cannot be considered prejudicial. In the course of the report, both written and from the oral testimony, there was given to the jury the details of broken bones, ruptured spleen, cut on chin, and torn and lacerated vaginal organs. No prejudicial errors could have resulted from the opinion statement in the autopsy report.

The appellant says the indictment being in the alternative is improper. He does not say he does not know the crime with which he is charged, or that he cannot determine the meaning of the indictment. He is charged with the death of Margaret Van Arsdale in committing a rape and attempting to commit a rape.

The statute defining murder in the first degree (Section 2901.01, Revised Code), uses the phrase "perpetrating or attempting to perpetrate rape." In the instant case, although great stress was laid upon the evidence of a vagina that was atrophied, and not capable of sexual relations, nevertheless, the statements of the appellant of repeated relations with the deceased Mrs. Van Arsdale made the alternative allegation necessary. The form of indictment as used meets the requirement set out in Section 2941.06, Revised Code, particularly in view of Sec-

tion 2941.08(I), Revised Code. See, also, Section 2941.29, Revised Code; and *Fry v. State of Ohio*, 43 O. App. 154. The indictment charges the offense of murder in the first degree and is not now subject to objection.

Considerable time was spent in oral argument over the alleged failure of the trial judge to properly define the included crime of manslaughter. The jury was told to examine the evidence with respect to first degree murder, and if they found any of the required claims not established beyond a reasonable doubt, then they should pass on to the included offense of second degree murder. If the jury were unable to agree that this included crime of second degree murder was not committed, then, and only then could they go further and consider another included offense, that of manslaughter. It is very apparent that the jury never considered any offense but first degree murder. They demonstrated by their verdict that no other crime was considered, and, hence, they never got to the point of inquiry as to manslaughter. Any alleged error in that charge could not be prejudicial.

We have examined the written instructions given to the jury, and we do not find them prejudicial to the rights of the appellant when examined as a complete charge.

The oral arguments of the prosecutor, and defense counsel, to the jury, are set out in full.

Complaint is made that the argument made by the prosecutor, and his assistant, was inflammatory and prejudicial. When viewed as a whole, we do not find it so in this case. While it is true that much of the argument was directed toward the feelings of the jury, and not a resume of the facts disclosed by the evidence, nevertheless, it did not transgress to such a point that we can find prejudicial error.

The use of certain physical items to demonstrate the contention of the prosecutor that the appellant did not testify truthfully about his relationship with the deceased, Mrs. Van Arsdale, was not prejudicial.

It is true that in the heat of trial, lawyers frequently forget, as was done here, that oral argument is not for the purpose of appealing to the feelings of the individual jurors, but, rather, such argument is to analyze the evidence and thereby point out to the jurors the truth of the position being advocated by the speaker. However, we find no error prejudicial to the rights of the appellant in the oral arguments to the jury.

In the oral argument presented in this appeal, counsel for appellant complained about the use of, and the manner of obtaining the confession of his client. No specific assignment of error raises this question, but we direct our attention to that complaint in the light of recent decisions of the United States Supreme Court.

The bill of exceptions states that in two or more instances, Woodards was apprised of his constitutional rights by an assistant prosecutor before questions were directed to him concerning his relations with Mrs. Van Arsdale. He had been questioned by a deputy sheriff previous to interrogation by the assistant prosecutor. This deputy also said that he told Woodards what his rights were but that, nevertheless, Woodards agreed to talk to him. There was no physical abuse or mistreatment of Woodards, but, on the contrary, his counsel said they treated him so nice that he was lulled into a sense of friendship, and by that means, Woodards divulged his conduct on the night of the crime.

Carnley v. Cochran, 369 U. S. 506, is no authority for a failure to obtain counsel for one who, knowing of his

rights, does not request counsel prior to making a confession of his criminal acts. Here we must say the record shows a waiver of counsel knowingly made.

Objection was made to the introduction into evidence of a statement which a deputy sheriff overheard Woodards make to his wife when she visited him in the jail. This objection was based upon the holding in the case of *Massiah v. United States*, 377 U. S. 201. There is no analogy in the facts.

In the instant case, Woodards knew of the presence of the deputy sheriff; the statement was made to his wife in answer to a question propounded by her; and the statement was voluntarily made. Further, it must be pointed out that the statement was hardly more than an admission that some act was done by him which, seemingly, he could not control. The statement was cumulative to a full and frank confession made earlier before indictment, and while the officers were investigating the case. The rule of the *Massiah* case, *supra*, does not apply.

Objection was made to the introduction of a statement given by Woodards to a deputy sheriff, on the ground that it was not lawfully obtained. The objection was not on the basis that the conversation regarding the conduct of Woodards at the Van Arsdale home was not voluntary, but that he was not then accorded his full constitutional rights. This objection is not supported by the cited case of *Jackson v. Denno*, 378 U. S. 368, 12 L. Ed. 2d 908. In that case, the confession was claimed to be involuntary; and the state of New York, where that accused person was tried, did not properly determine the issue of voluntary self-incrimination. That is not the situation herein. We must point out that no written confession was introduced in evidence in the instant case; Woodards and his doctor testified and told a generally similar story, except

as to the voluntariness of the relations between the accused and Mrs. Van Arsdale.

The rule laid down in various cases in the Federal courts, and reaffirmed in *Jackson v. Denno,* 12 L. Ed. 2d, p. 908 at 915, which rule is "* * * that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, * * * and even though there is ample evidence aside from the confession to support the conviction * * *." This rule was not violated in the case before us.

Another case cited by counsel for Woodards as authority for the claim (made in oral argument), that his constitutional rights had been violated, is *Gideon v. Wainwright,* 372 U. S. 335. In that case, Gideon was denied counsel. In the instant case, Woodards had very able counsel who skillfully used all lawful means to assist their client. Woodards' rights, under the rule announced in *Gideon v. Wainwright,* were not violated.

Our matter here is distinguishable, also, from the case of *Escobedo v. Illinois,* 12 L. Ed. 2d 977, decided June 22, 1964. In that case, incriminating statements were made by the accused in the presence of police officers who were investigating the crime. These statements were made before indictment. Up to that point, the facts of the instant case correspond, but the great difference is that in the case of *Escobedo v. Illinois, supra,* the accused was not informed of his right to remain silent, and his request for counsel, prior to making any statement, was denied. This is not our case, and there is no violation of due process based on that judicial pronouncement.

We have examined all claims of error and find none prejudicial to the rights of the appellent. The judgment must be affirmed.

Judgment affirmed.

JUDGMENT OF THE SUPREME COURT OF THE STATE OF OHIO, MARCH 30, 1966.

This cause, here on appeal from the Court of Appeals for Lorain County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this court proceeding as required by law to fix a date for carrying said sentence into execution, it is ordered by the Court that said sentence be carried into execution by the Warden of the Ohio Penitentiary, or in his absence by the Deputy Warden, on the 29th day of April, A. D. 1966, in accordance with the statutes in such case made and provided. It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Warden of the Ohio Penitentiary and the Warden make due return thereof to the Clerk of the Court of Common Pleas of Lorain County; and it appearing that there were reasonable grounds for this appeal; it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lorain County for entry.

APPENDIX B.

STATUTES AND RULE.

Ohio Revised Code.

§ 2321.03 *Exception not necessary.*

An exception is not necessary, at any stage or step of the case or matter, to lay a foundation for review whenever a matter has been called to the attention of the court by objection, motion, or otherwise and the court has ruled thereon. Error can be predicated upon erroneous statements contained in the charge, not induced by the complaining party, without exception being taken to the charge.

§ 2505.21 *Hearing on appeal.*

Appeals taken on questions of law shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant before hearing. Errors not specifically pointed out in the record and separately argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error within the time prescribed by the court rules is cause for dismissal of such appeal. All errors assigned and briefed shall be passed upon [by] the court. In its decision the reviewing court shall specify such of the assigned errors as it finds are shown by the record and the reasons for its decision. In every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the errors found in the record upon which the judgment of reversal is founded.

An appeal taken on questions of law and fact entitles the party to a hearing and determination of the facts de

novo which shall be upon the same or amended pleadings. The court shall review the final order, judgment or decree upon such part of the record made in the trial court as any party may present to the court and such additional evidence as upon application in the interest of justice the court may authorize to be taken, such evidence to be presented in the manner and form prescribed by the court.

§ 2901.01 *Murder in the first degree.*

No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another.

Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life.

Murder in the first degree is a capital crime under Sections 9 and 10 of Article 1, Ohio Constitution.

§ 2935.05 *Affidavit filed in case of arrest without warrant.*

When a person named in section 2935.03 of the Revised Code has arrested a person without a warrant, he shall, without unnecessary delay, take the person arrested before a court or magistrate having jurisdiction of the offense, and shall file or cause to be filed an affidavit describing the offense for which the person was arrested. Such affidavit shall be filed either with the court or magistrate, or with the prosecuting attorney or other attorney charged by law with prosecution of crimes before such court or magistrate and if filed with such attorney he shall

forthwith file with such court or magistrate a complaint, based on such affidavit.

§ 2935.07 *Person arrested without warrant shall be informed of cause of arrest.*

When an arrest is made without a warrant by an officer, he shall inform the person arrested of such officer's authority to make the arrest and the cause of the arrest.

When an arrest is made by a private person, he shall, before making the arrest, inform the person to be arrested of the intention to arrest him and the cause of the arrest.

When a person is engaged in the commission of a criminal offense, it is not necessary to inform him of the cause of his arrest.

§ 2935.14 *Rights of person arrested.*

If the person arrested is unable to offer sufficient bail or, if the offense charged be a felony, he shall, prior to being confined or removed from the county of arrest, as the case may be, be speedily permitted facilities to communicate with an attorney at law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel (or in cases of misdemeanors or ordinance violation for the purpose of arranging bail). He shall not thereafter be confined or removed from the county or from the situs of initial detention until such attorney has had reasonable opportunity to confer with him privately, or other person to arrange bail, under such security measures as may be necessary under the circumstances.

Whoever, being a police officer in charge of a prisoner, or the custodian of any jail or place of confinement, violates this section shall be fined not less than one hundred nor

more than five hundred dollars or imprisoned not more than thirty days, or both.

Federal Rules of Criminal Procedure.

Rule 5 (a) *Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

APPENDIX C.

MISCELLANEOUS.

Excerpt From the Opinion of Judge Kaufman in United States v. Freeman, 357 F. 2d 606, 612-627 (2nd Cir. 1966).

* * * * *

THE ISSUE RAISED AT TRIAL.

We shall first dispose of the government's contention that the defense did not offer a proper objection to the Court's rulings on the test to be applied. We need not tarry long on this aspect of the case.

When questioning Dr. Denber, Freeman's counsel inquired if, under a "strict interpretation" of M'Naghten, Freeman would be considered criminally responsible. Before Dr. Denber could answer, the government objected on the ground that the question inadequately defined the standard the doctor was to apply in giving his response. Judge Tenney, without ruling directly on the government's objection, declared that "This Court is following the M'Naghten rule in this case." [12] Thus put on notice by the Court as to the governing standard, Freeman's counsel promptly agreed that he would not inquire of Dr. Denber whether Freeman was capable of conforming his actions to the law in terms of any definition of criminal responsibility other than that provided by M'Naghten.

The government urges that the foregoing colloquy was not sufficiently specific, and accordingly asks us not to consider whether Freeman's competency was determined by the appropriate standard. Cf. *United States v.*

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[12] At a later point, the trial judge referred to the test as M'Naghten plus "irresistible impulse" but ultimately returned to just M'Naghten when counsel informed him there was no "irresistible impulse" question in the case.

Indiviglio, 352 F. 2d 276 (2d Cir. 1965). It argues that Freeman's counsel never objected to the court's decision to employ the M'Naghten Rules and, in addition, failed to offer alternative tests of criminal responsibility for the court's consideration. This failure, the government asserts, prevented Judge Tenney from passing meaningfully on the adequacy of M'Naghten with the result that we are deprived of the insight which prior judicial consideration could have provided.

We are persuaded that the colloquy with counsel referred to above sufficiently enlightened the court as to the point being raised. Fed. R. Crim. P. 51; see also *Jackson v. United States*, 250 F. 2d 897 (5th Cir. 1958). The exchange between Judge Tenney and Freeman's counsel indicates quite clearly that the Judge understood counsel's desire to elicit evidence which would have been relevant if the Judge determined to employ tests of criminal responsibility broader and more liberal than M'Naghten. We think it equally clear, moreover, that counsel reasonably interpreted the Judge's statement that M'Naghten was the rule in this Circuit as a direction from the Bench to restrict questions addressed to the expert witnesses solely to psychiatric information which would be admissible under the "right-wrong" test. Even if counsel had made elaborate offers of proof of Freeman's incompetency under the alternative tests, it is probable that Judge Tenney would have adhered to his decision in view of the long-standing use of M'Naghten in the District Courts.[13] Since it is apparent that both Court and counsel were fully cognizant of the issues being raised—and since any further showing would have been an exercise in futility—

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[13] Even after Freeman's counsel mentioned the *Durham* test, see *infra*, Judge Tenney indicated that he would adhere to M'Naghten.

it is entirely proper that we consider the governing principles on appeal.

I.

It need scarcely be observed that the sufficiency of the M'Naghten Rules as a test of criminal responsibility would not be an open question to us if the Supreme Court had definitely spoken on the issue. Bound by Supreme Court precedent, we would of course be compelled to follow any decision of that body which adopted M'Naghten as the exclusive criterion in federal prosecutions, regardless of our dissatisfaction with such a test. As a distinguished attorney and former Secretary of State has recently and perceptively observed in another context, federal judges are hardly empowered to satisfy a mere "desire for change in the law in accordance with the decider's own conception of right. [They] may conscientiously be seeking to administer justice, but it is personal justice—the justice of Louis IX or Harun al-Rashid, not that described on the lintel of the Supreme Court Building, 'Equal Justice Under Law.' "[14]

Despite the government's arguments to the contrary, however, we do not believe that the Supreme Court has placed its stamp of approval on M'Naghten, and we find the cases cited for this proposition to be readily and clearly distinguishable. Thus, *United States v. Davis* (I), 160 U. S. 469 (1895), and *United States v. Davis* (II), 165 U. S. 373 (1897), do not represent a square holding as to the sufficiency of M'Naghten. The former was concerned with the issue of burden of proof—rather than the applicable standard—while the latter primarily involved a claim that the trial court's charge was so narrow as not

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[14] Acheson, Morning and Noon, 69 (1965).

even to give the defendant the full benefit of M'Naghten. Neither case, in short, raised the question whether M'Naghten should be replaced or supplemented by alternative tests.[15]

Subsequent cases are equally barren of direct challenges to M'Naghten. *Hotema v. United States*, 186 U. S. 413 (1902), merely held a jury charge sufficiently broad to embrace the particular defense there asserted. *Matheson v. United States*, 227 U. S. 540 (1913), in which the charge strikingly foreshadowed the much later-developed *Durham* rule, turned on the fact that the instructions actually given were essentially those requested by the defendant. The remaining decisions cited by the government, finally, concern not a test to be applied in federal prosecutions, but rather the constitutional propriety under the Fourteenth Amendment's "due process" clause of state adoptions of M'Naghten or variations of M'Naghten. In *Leland v. Oregon*, 343 U. S. 790, 800 (1952), for example, Mr. Justice Clark wrote: "The science of psychiatry has made tremendous strides since that test was laid down in M'Naghten's case, but the progress of science has not reached a point where its learning would *compel us to require the states to eliminate the right and wrong test from their criminal law.*" (Emphasis supplied.) Our duty to supervise the administration of criminal justice in the courts of this Circuit can hardly be subject to the same

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[15] The first Mr. Justice Harlan focused the question presented in *Davis I* as follows: "Upon whom must rest the burden of proving that the accused, whose life it is sought to take under the forms of law, belongs to a class capable of committing a crime." 160 U. S. at 489.

While dicta are present in *Davis II* indicating approval of the trial judge's charge which was derived from M'Naghten, the record in that case leads us to believe that language is not sufficiently decisive to establish a rule of competency for the federal courts.

restrictions as our power to impose constitutional requirements upon unwilling state tribunals.

Our conclusion that the Supreme Court has not definitively spoken on the issue is in accord with that of a substantial number of the Courts of Appeals which have considered the question. Although the Court of Appeals for the Ninth Circuit found that only the Supreme Court or Congress[16] could modify M'Naghten, *Sauer v. United States,* 241 F. 2d 640 (9th Cir.), *cert. denied,* 354 U. S. 940 (1957), the District of Columbia, Third and Tenth Circuits adopted a contrary position. After an exhaustive analysis of the decisions in this area, Chief Judge Biggs, who has for many years advocated change and has authored exceptionally scholarly works on the subject, including his trailblazing dissent in *United States ex rel. Smith v. Baldi,* 192 F. 2d 540 (3rd Cir., 1951), concluded that the Third Circuit need not feel "constrained to adhere to and uphold the M'Naghten Rules." *United States v. Currens,* 290 F. 2d 751, 771 (1961). And Chief Judge Murrah, who has been an appellate judge for over a quarter of a century and has been in the forefront of judicial and administrative reforms, speaking for the Tenth Circuit, observed that since criminal responsibility was a rule of decision of the federal courts based upon common law concepts, it was always appropriate to "re-examine and re-appraise" it. *Wion v. United States,* 325 F. 2d 420, 425 (1963), *cert. denied,* 377 U. S. 946 (1964).[17] It also seems significant that in the face of a proliferation of cases in the area of criminal responsibility, the Supreme Court has consistently

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[16] M'Naghten is strictly a judge-made rule. Its use in the federal system does not stem from any Act of Congress.

[17] See also, Mueller, "M'Naghten Remains Irreplaceable: Recent Events in the Law of Incapacity," 50 Georgetown L. Jour. 105, 108 (1961): The courts of the United States "have inherent judicial power to rule on the law of insanity."

refrained from granting certiorari to consider this issue, despite inconsistent results among state courts and federal circuits.[18] At least one writer has suggested that the Supreme Court's inaction in this area is not mere coincidence, but is motivated by a desire to encourage the Circuits to discuss and develop alternative tests before making a definitive ruling.[19]

After considerable reflection on the issues presented, we therefore conclude that we cannot escape our duty to consider whether the M'Naghten Rules or the M'Naghten Rules augmented by the "irresistible impulse" test should continue to remain the test of criminal responsibility in this federal jurisdiction.

II.

We are here seeking a proper test of criminal responsibility. That we are not instead deciding the initial question —whether lack of such responsibility, however defined, should be a defense in criminal prosecutions—itself seems significant and worthy of at least some brief comment.

The criminal law, it has been said, is an expression of the moral sense of the community. The fact that the law has, for centuries, regarded certain wrong-doers as improper subjects for punishment is a testament to the extent to which that moral sense has developed. Thus, society has recognized over the years that none of the three asserted

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[18] Among the most prominent cases are: *United States v. Cain*, 298 F. 2d 934 (7th Cir.), *cert. denied*, 370 U. S. 902 (1962); *Sauer v. United States*, 241 F. 2d 640 (9th Cir.), *cert. denied*, 354 U. S. 940 (1957); *Wion v. United States*, 325 F. 2d 420 (10th Cir.), *cert. denied*, 377 U. S. 946 (1964); *Carter v. United States*, 325 F. 2d 697 (5th Cir.), *cert. denied*, 377 U. S. 946 (1964); *Dusky v. United States*, 295 F. 2d 743 (8th Cir.), *cert. denied*, 368 U. S. 998 (1962).

[19] Moore, Jr., "M'Naghten Is Dead—Or Is It?," 3 Houston L. Rev. 58, 60 (1965).

purposes of the criminal law—rehabilitation, deterrence and retribution—is satisfied when the truly irresponsible, those who lack substantial capacity to control their actions, are punished.[20]

What rehabilitative function is served when one who is mentally incompetent and found guilty is ordered to serve a sentence in prison? Is not any curative or restorative function better achieved in such a case in an institution designed and equipped to treat just such individuals? And how is deterrence achieved by punishing the incompetent? Those who are substantially unable to restrain their conduct are, by definition, undeterrable and their "punishment" is no example for others; those who are unaware of or do not appreciate the nature and quality of their actions can hardly be expected rationally to weigh the consequences of their conduct. Finally, what segment of society can feel its desire for retribution satisfied when it wreaks vengeance upon the incompetent? Although an understandable emotion, a need for retribution can never be permitted in a civilized society to degenerate into a sadistic form of revenge.[21]

A recognition that traditional notions of crime and punishment were inapplicable to the truly "irresponsible" hence came early to Anglo-American criminal law. We turn now to a consideration of those early stirrings.

III.

M'Naghten and its antecedents can, in many respects, be seen as examples of the law's conscientious efforts to

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[20] See Moberly, Responsibility, 1-24 (1956).

[21] See Wechsler and Michael, "A Rationale of the Law of Homicide," 37 Col. L. Rev. 701, 752-761 (1937).

"Revenge," in the words of Francis Bacon, "is a kind of wild justice which the more man's nature runs to, the more ought law to weed it out."

place in a separate category, people who cannot be justly held "responsible" for their acts. As far back as 1582, William Lambard of Lincoln's Inn set forth what can be viewed as the forerunner of the M'Naghten test as we know it: "If a man or a natural fool, or a lunatic in the time of his lunacy, or a child who apparently has no knowledge of good or evil do kill a man, this is no felonious act * * * for they cannot be said to have any understanding will." [22] By 1724, the language had shifted from "good or evil" to the more familiar emphasis on the word "know." Thus, in *Rex v. Arnold,* 16 How. St. Tr. 695, 764, the "Wild Beast" test was enunciated. It provided for exculpation if the defendant "doth not *know* what he is doing, no more than * * * a wild beast." [23] (Emphasis added.)

By modern scientific standards the language of these early tests is primitive. In the 18th Century, psychiatry had hardly become a profession, let alone a science. Thus, these tests and their progeny were evolved at a time when psychiatry was literally in the Dark Ages.[24]

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[22] As quoted in Moore, *op. cit. supra,* note 19 at 62.

[23] It is highly significant that Dr. Carson's conception of the M'Naghten rule harked back to the right-wrong formulation's ancient forerunner, the "Wild Beast" test. Testifying for the government, Dr. Carson described his view of the high degree of emotional and cognitive impairment required for M'Naghten to become applicable: "My personal concept of somebody of that degree of mental illness would be that he would not be able to participate in this particular type of common relationship, that he would, for example, not be able to care for himself adequately, perhaps need some type of constant personal supervision and somebody to clothe him, feed him. He might be agitated to a high degree that he would be *a very wild, incoherent* type of person." (Emphasis added.)

[24] For example, in this pre-M'Naghten period, belief in the concept of witchcraft was widespread and, unfortunately, became entangled in the attempt to set forth rules of criminal responsibility. Indeed, witches and wizards could never be exculpated on the ground of criminal incompetency because, by

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In the pre-M'Naghten period, the concepts of phrenology and monomania were being developed and had significant influence on the right and wrong test. Phrenologists believed that the human brain was divided into thirty-five separate areas, each with its own peculiar mental function. The sixth area, for example, was designated "destructiveness." It was located, we are told, above the ear because this was the widest part of the skull of carnivorous animals.[25] Monomania, on the other hand, was a state of mind in which one insane idea predominated while the rest of the thinking processes remained normal.[26]

Of course, both phrenology and monomania are rejected today as meaningless medical concepts since the human personality is viewed as a fully integrated system. But, by an accident of history, the rule of M'Naghten's case froze these concepts into the common law just at a time when they were becoming obsolete. A discussion of M'Naghten's case will demonstrate how this came about. Daniel M'Naghten suffered from what now would be described as delusions of persecution.[27] Apparently, he con-

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definition, they could distinguish between right and wrong. After all, these individuals who believed they possessed supernatural powers chose voluntarily to follow a course which was the very embodiment of evil. If it taxes credulity to acknowledge that "intelligent" people believed in witches and wizards, we merely need observe that no less an eminent legal scholar than Blackstone insisted that such creatures existed. Biggs, The Guilty Mind, 61 (1955).

[25] *Id.* at 93.

[26] Guttmacher and Weihofen, Psychiatry and the Law, 418 (1952).

[27] *Id.* at 403. That Guttmacher and Weihofen are correct in their diagnosis of M'Naghten's illness is borne out by the following excerpt from one of M'Naghten's statements: "The tories in my native city have compelled me to do this. They follow and persecute me wherever I go, and have entirely destroyed my

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sidered his major persecutor to be Robert Peel, then Prime Minister of England, for M'Naghten came to London with the intention of assassinating the chief of the Queen's government. His plan would have succeeded but for the fact that Peel chose to ride in Queen Victoria's carriage because of her absence from the city, while Drummond, his secretary, rode in the vehicle which normally would have been occupied by Peel. M'Naghten, believing that the Prime Minister was riding in his own carriage, shot and killed Drummond in error.[28]

After a lengthy trial in 1843, M'Naghten was found "not guilty by reason of insanity." M'Naghten's exculpation from criminal responsibility was most significant for several reasons. His defense counsel had relied in part upon Dr. Isaac Ray's historic work, *Medical Jurisprudence of Insanity,* which had been published in 1838. This book, which was used and referred to extensively at the trial, contained many enlightened views on the subject of criminal responsibility in general and on the weaknesses of the right and wrong test in particular. Thus, for example, the jury was told that the human mind is not compartmentalized and that a defect in one aspect of the personality could spill over and affect other areas. As Chief Judge Biggs tells us in his Isaac Ray lectures compiled in *The Guilty Mind,* the court was so impressed with this and

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peace of mind * * * I cannot sleep at night in consequence of the course they pursue towards me. * * * They have accused me of crimes of which I am not guilty, they do everything in their power to harass and persecute me; in fact they wish to murder me." Ellison and Haas, "A Recent Judicial Interpretation of the M'Naghten Rule," 4 Brit. Jour. of Delinquency 129 (1953), as quoted in Roche, "Criminality and Mental Illness—Two Faces on the Same Coin," 22 Univ. of Chi. L. Rev. 320, 324 (1955).

[28] Glueck, Mental Disorder and the Criminal Law, 162-63 (1925). See also Biggs, *op. cit. supra,* note 24 at 95-97.

other medical evidence of M'Naghten's incompetency that Lord Chief Justice Tindal practically directed a verdict for the accused.[29]

For these reasons, M'Naghten's case could have been the turning point for a new approach to more modern methods of determining criminal responsibility. But the Queen's ire was raised by the acquittal and she was prompted to intervene. Mid-19th Century England was in a state of social upheaval and there had been three attempts on the life of the Queen and one on the Prince Consort. Indeed, Queen Victoria was so concerned about McNaghten's acquittal that she summoned the House of Lords to "take the opinion of the Judges on the law governing such cases." Consequently, the fifteen judges of the common law courts were called in a somewhat extraordinary session under a not too subtle atmosphere of pressure[30] to answer five prolix and obtuse questions on the status of criminal responsibility in England. Significantly, it was Lord Chief Justice Tindal who responded for fourteen of the fifteen judges, and thus articulated what has come to be known as the M'Naghten Rules of M'Naghten test. Rather than relying on Dr. Ray's monumental work which had apparently impressed him at M'Naghten's trial, Tindal,

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[29] Biggs, *op. cit. supra,* note 24 at 102.

[30] A good example of the establishment's reaction to M'Naghten's acquittal is the address of the Lord Chancellor to the House of Lords: "A gentleman in the prime of life, of a most amiable character, incapable of giving offence or of injuring any individual, was murdered in the streets of this metropolis in open day. The assassin was secure; he was committed for trial; that trial has taken place, and he has escaped with impunity. Your Lordships will not be surprised that these circumstances have created a deep feeling in the public mind, and that many persons should, upon the first impression, be disposed to think that there is some great defect in the laws of the country with reference to this subject which calls for a revision of those laws in order that a repetition of such outrage may be prevented." As quoted in Glueck, *op. cit. supra,* note 28 at 164.

with the Queen's breath upon him, reaffirmed the old restricted right-wrong test despite its 16th Century roots and the fact that it, in effect, echoed such uninformed concepts as phrenology and monomania. In this manner, Dr. Ray's insights were to be lost to the common law for over one hundred years except in the small state of New Hampshire.[31]

The foregoing necessarily abbreviated historical account makes manifest some of the critical infirmities of the M'Naghten test, not the least of which are the manner in which it was formulated and the charged atmosphere in which it was spawned. Even contemporaries questioned the validity of a rule that was not the product of the case-by-case method traditional with common law judges. Thus, Mr. Justice Maule, the fifteenth member of the panel summoned by the House of Lords, concurred in the use of the right-wrong test but expressed deep reservations about answering questions put to the judges abstractly without the benefit of a concrete case and argument.[32] Sir James Stephen, the noted historian, was another who found fault with the system which produced M'Naghten. He observed that "every judgment delivered since the year 1843 has been founded upon an authority which deserves to be described as in many ways doubtful." [33] Dr. Henry Maudsley, Isaac Ray's English contemporary, remarked

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[31] Because of the influence of Dr. Ray, New Hampshire adopted a test which was a precursor of the modern *Durham* rule. See *State v. Pike*, 49 N. H. 399 (1870). See also, Reid, "Understanding the New Hampshire Doctrine of Criminal Insanity," 69 Yale L. Jour. 366 (1960); and Reid, "The Companion of the New Hampshire Doctrine of Criminal Insanity," 15 Vanderbilt L. Rev. 721 (1962).

[32] See generally 67 Hansard's Parliamentary Debates (3d Series) 714-774.

[33] II Stephen, History of the Criminal Law of England 153 (1883).

not long after the M'Naghten Rules were enunciated, that the judges were adhering to "an absurd dictum which has long been discredited by medical science." [34]

But the principal objection to M'Naghten is not that it was arrived at by this extraordinary process. Rather, the rule is faulted because it has several serious deficiencies which stem in the main from its narrow scope. Because M'Naghten focuses only on the cognitive aspect of the personality, i.e., the ability to know right from wrong, we are told by eminent medical scholars that it does not permit the jury to identify those who can distinguish between good and evil but who cannot control their behavior. The result is that instead of being treated at appropriate mental institutions[35] for a sufficiently long period to bring about a cure or sufficient improvement so that the accused may return with relative safety to himself and the community, he is ordinarily sentenced to a prison term as if criminally responsible and then released as a potential recidivist with society at his mercy. To the extent that these individuals continue to be released from prison because of the narrow scope of M'Naghten, that test poses a serious danger to society's welfare.[36]

Similarly, M'Naghten's single track emphasis on the cognitive aspect of the personality recognizes no degrees

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[34] As quoted in Guttmacher, "The Psychiatrist as an Expert Witness," 22 U. of Chi. L. Rev. 325 (1955).

[35] We recognize our inability to determine at this point whether society possesses sufficient hospital facilities and doctors to deal with criminals who are found to be incompetent. But our function as judges requires us to interpret the law in the best interest of society as a whole. We therefore suggest that if there are inadequate facilities and personnel in this area, Congress, the state legislatures and federal and state executive departments should promptly consider bridging the gap.

[36] Biggs, *op. cit. supra*, note 24 at 145. See also Note, "Legislative Changes in New York Criminal Insanity Statutes," 40 St. John's L. Rev. 76 (1965).

of incapacity. Either the defendant knows right from wrong or he does not and that is the only choice the jury is given. But such a test is grossly unrealistic; our mental institutions, as any qualified psychiatrist will attest, are filled with people who to some extent can differentiate between right and wrong, but lack the capacity to control their acts to a substantial degree. As the commentary to the American Law Institute's Model Penal Code observes, "The law must recognize that when there is no black and white it must content itself with different shades of gray." [37]

A further fatal defect of the M'Naghten Rule stems from the unrealistically tight shackles which they place upon expert psychiatric testimony. When the law limits a testifying psychiatrist to stating his opinion whether the accused is capable of knowing right from wrong, the expert is thereby compelled to test guilt or innocence by a concept which bears little relationship to reality. He is required thus to consider one aspect of the mind as a "logic-tight compartment in which the delusion holds sway leaving the balance of the mind intact. * * *" [38]

Prominent psychiatrists have expressed their frustration when confronted with such requirements. Echoing such complaints, Edward de Grazia has asked, "How [does one] translate 'psychosis' or 'psychopathy' or 'dementia praecox' or even 'sociopathy' or 'mental disorder' or 'neurotic character disorder' or 'mental illness' into a

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[37] American Law Institute, Model Penal Code (Tentative Drafts, Nos. 1, 2, 3 and 4) 158 (1956). See also, Gaylin, "Psychiatry and the Law: Partners in Crime," Columbia University Forum 23 (1965).

M'Naghten's insistence on absolutes also was recently criticized by Truman Capote in his book, In Cold Blood, as "a formula quite color-blind to any gradations between black and white * * *" p. 294.

[38] Glueck, *op. cit. supra,* note 28 at 169-170.

psychiatric judgment of whether the accused knew 'right' from 'wrong.'" [39] In stronger and more vivid terms, Dr. Lawrence Kolb, Director of the New York Psychiatric Institute, Professor and Chairman of the Department of Psychiatry at Columbia University and Director of the Psychiatric Service at Presbyterian Hospital, expressed a similar viewpoint when he declared that "answers supplied by a psychiatrist in regard to questions of rightness or wrongness of an act or 'knowing' its nature constitute a professional perjury." [40]

Psychiatrists are not alone in their recognition of the unreality of M'Naghten. As long ago as 1930, Mr. Justice Cardozo observed that "everyone contends that the present definition of insanity has little relation to the truths of mental life." [41] And Mr. Justice Frankfurter, as a witness before the Royal Commission on Capital Punishment, declared with his usual fervor: "I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated. * * * I think the M'Naghten Rules are in large measure shams. That is a very strong word, but I think the M'Naghten Rules are very difficult for conscientious people and not difficult enough for people who say, 'We'll just juggle them.'" [42]

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[39] de Grazia, "The Distinction of Being Mad," 22 U. of Chi. L. Rev. 339, 341 (1955). Mr. de Grazia is a member of the District of Columbia Bar.

[40] Remarks, Judicial Conference (2d Cir.), "Insanity as a Defense," 37 F. R. D. 365, 387 (1964).

[41] What Medicine Can Do For Law, 32 (1930).

[42] Report of the Royal Commission on Capital Punishment, 102 (1953). Indeed, the Royal Commission recommended abrogating M'Naghten and leaving the jury "to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible." *Id.* at 116.

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The tremendous growth of psychiatric knowledge since the Victorian origins of M'Naghten and even the near-universal disdain in which it is held by present-day psychiatrists are not by themselves sufficient reasons for abandoning the test. At bottom, the determination whether a man is or is not held responsible for his conduct is not a medical but a legal, social or moral judgment. Ideally, psychiatrists—much like experts in other fields—should provide grist for the legal mill, should furnish the raw data upon which the legal judgment is based. It is the psychiatrist who informs as to the mental state of the accused—his characteristics, his potentialities, his capabilities. But once this information is disclosed, it is society as a whole, represented by judge or jury, which decides whether a man with the characteristics described should or should not be held accountable for his acts. In so deciding, it cannot be presumed that juries will check their common sense at the courtroom door. As Professor Wechsler has rightly commented, "It's not to be expected that juries will lightly accept the proposition that one who seemingly knew in a true sense did not know. One would expect jury skepticism and the system is the healthier for that jury skepticism." [43]

The true vice of M'Naghten is not, therefore, that psychiatrists will feel constricted in artificially structuring their testimony but rather that the ultimate deciders—the judge or the jury—will be deprived of information vital to their final judgment. For whatever the social climate

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Mr. Justice Douglas and Mr. Justice Brennan have also indicated dissatisfaction with M'Naghten. See Douglas, "The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists," 41 Iowa L. Rev. 485 (1956). Brennan, "Psychiatry Must Join in Defending Mentally Ill Criminals," 49 A. B. A. J. 239 (1960).

[43] Remarks, *op. cit. supra,* note 40 at 385.

of Victorian England, today's complex and sophisticated society will not be satisfied with simplistic decisions, based solely upon a man's ability to "know" right from wrong. It is in this respect that the vast strides made in public awareness and acceptance of psychiatry and psychiatric methods may even be more significant than the scientific developments which gave rise to them. Few areas of modern American culture—from the personnel offices of our giant corporations to the pages of our mass-circulation magazines—have been untouched by the psychiatric revolution. In this setting, a test which depends vitally on notions already discredited when M'Naghten was adopted can no longer be blandly accepted as representing the "moral sense of the community." To continue to apply such medically discarded concepts would be to follow a negative approach which is the result of a hold-over of long outmoded attitudes rather than a policy decision grounded in reason or science.

IV.

Efforts to supplement or replace the M'Naghten Rules with a more meaningful and workable test have persisted for generations, with varying degrees of success. Perhaps the first to receive judicial approval, however, was more an added fillip to M'Naghten than a true substitute: the doctrine which permits acquittal on grounds of lack of responsibility when a defendant is found to have been driven by an "irresistible impulse" to commit his offense.[44] In one form or another, the "irresistible impulse" test has become encrusted on the law of several jurisdictions, in-

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[44] See discussion in "Murder Without Apparent Motive: A Study in Personality Disorganization," by Satten, J., Menninger, K., Rosen, I., and Mayman, M., in 117 Am. Jour. Psych., 48-53 (1960).

cluding the District Courts of this Circuit, and is now a familiar part of the vocabulary of millions since it was successfully invoked by the defendant of Robert Travers' celebrated novel and motion picture, "Anatomy of a Murder."

As it has commonly been employed, however, we find the "irresistible impulse" test to be inherently inadequate and unsatisfactory. Psychiatrists have long questioned whether "irresistible impulses" actually exist; the more basic legal objection to the term "irresistible impulse" is that it is too narrow and carries the misleading implication that a crime impulsively committed must have been perpetrated in a sudden and explosive fit. Thus, the "irresistible impulse" test is unduly restrictive because it excludes the far more numerous instances of crimes committed after excessive brooding and melancholy by one who is unable to resist sustained psychic compulsion or to make any real attempt to control his conduct.[45] In seeking one isolated and indefinite cause for every act, moreover, the test is unhappily evocative of the notions which underlay M'Naghten—unfortunate assumptions that the problem can be viewed in black and white absolutes and in crystal-clear causative terms.

In so many instances the criminal act may be the reverse of impulsive; it may be coolly and carefully prepared yet nevertheless the result of a diseased mind.[46] The "irresistible impulse" test is therefore little more than a gloss on M'Naghten, rather than a fundamentally new approach to the problem of criminal responsibility. It is, as one pro-

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[45] Wechsler, "The Criteria of Criminal Responsibility," 22 U. of Chi. L. Rev. 367, 393 (1955).

[46] See Report, Royal Commission on Capital Punishment, *op. cit. supra*, note 42 at 110.

fessor explained, "a relatively unobnoxious attempt to improve upon M'Naghten." [47]

With the exception of New Hampshire, American courts waited until 1954 and Judge Bazelon's opinion for the District of Columbia Circuit in *Durham v. United States*,[48] for legal recognition that disease or defect of the mind may impair the whole mind and not a subdivided portion of it. The *Durham* court swept away the intellectual debris of a century and articulated a test which was as simple in its formulation as its sources were complex. A defendant is not criminally responsible, wrote Judge Bazelon, "if his unlawful act was the product of mental disease or mental defect." [49]

The advantages of *Durham* were apparent and its arrival was widely hailed. The new test entirely eliminated the "right-wrong" dichotomy, and hence interred the overriding emphasis on the cognitive element of the personality which had for so long plagued M'Naghten. The fetters upon expert testimony were removed and psychiatrists were permitted and indeed encouraged to provide all relevant medical information for the common sense application of judge or jury.

Finally, *Durham* ended to a large degree the "professional perjury" decried by psychiatrists—the "juggling" of legal standards made inevitable by M'Naghten and rightly deplored by Justice Frankfurter. Too often, the unrealistic dogma of M'Naghten had compelled expert witnesses to "stretch" its requirements to "hard cases"; sympathetic to the plight of a defendant who was not, in fairness, responsible for his conduct, psychiatrists had found it necessary

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[47] Mueller, *op. cit. supra* note 17 at 107.

[48] 214 F. 2d 862 (1954).

[49] *Id.* at 874.

to testify that the accused did not know his act was "wrong" even when the defendant's words belied this conclusion. In its frank and express recognition that criminality resulting from mental disease or defect should not bring forth penal sanctions, *Durham* brought an end to this all-too-frequent practice of "winking" at legal requirements, a practice which had contributed little to the self-respect and integrity of either medicine or the law.

In the aftermath of *Durham*, however, many students of the law recognized that the new rule, despite its many advantages, also possessed serious deficiencies. It has been suggested, for example, that *Durham's* insistence that an offense be the "product" of a mental disease or defect raised near-impossible problems of causation,[50] closely resembling those encountered by the M'Naghten and irresistible impulse tests.

The most significant criticism of *Durham*, however, is that it fails to give the fact-finder any standard by which to measure the competency of the accused. As a result, psychiatrists when testifying that a defendant suffered from a "mental disease or defect" in effect usurped the jury's function. This problem was strikingly illustrated in 1957, when a staff conference at Washington's St. Elizabeth's Hospital reversed its previous determination and reclassified "psychopathic personality" as a "mental disease." Because this single hospital provides most of the psychiatric witnesses in the District of Columbia courts, juries were abruptly informed that certain defendants who had previously been considered responsible were now to be acquitted. *Blocker v. United States*, 288 F. 2d 853, 860 (D. C. Cir. 1961) (Burger, *J.* concurring). It seems clear

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[50] Weihofen, "The Flowering of New Hampshire," 22 U. of Chi. L. Rev. 356, 360 (1955).

that a test which permits all to stand or fall upon the labels or classifications employed by testifying psychiatrists hardly affords the court the opportunity to perform its function of rendering an independent legal and social judgment.[51]

V.

In 1953, a year before *Durham*, the American Law Institute commenced an exhaustive study of criminal conduct including the problem of criminal responsibility. In the ensuing months and years, under the scholarly direction of Professors Herbert Wechsler of Columbia University, its Chief Reporter, and Louis B. Schwartz of the University of Pennsylvania, Co-Reporter, the leading legal and medical minds of the country applied themselves to the task. Gradually and painstakingly a new definition of criminal responsibility began taking shape as Section 4.01 of the Model Penal Code was evolved. Before its penultimate articulation, drafts and redrafts of the section were submitted to and revised by an advisory committee comprised of distinguished judges, lawyers, psychiatrists, and penologists. After committee approval was obtained, successive drafts were debated and considered by the Council, and later by the full membership, of the Institute. Nine long years of research, exploration and consideration culmi-

[51] To correct many of the deficiencies of *Durham*, the Washington, D. C. Court of Appeals amplified its definition of mental disorder for the purpose of making "it very clear that neither the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect." To reinforce its decision, the Court redefined mental disease and defect to include "any abnormal condition of the mind which *substantially* affects mental or emotional processes and *substantially* impairs behavior controls." *McDonald v. United States*, 312 F. 2d 847, 851 (1962) (Emphasis added). It thus adopted a formulation which closely approximates the recommendation of the American Law Institute in its Model Penal Code. See *infra*.

nated in the definitive version of Section 4.01, which was finally adopted by the Institute in 1962.

Section 4.01 provides that "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." [52] For reasons which will be more fully set forth, we believe this test to be the soundest yet formulated and we accordingly adopt it as the standard of criminal responsibility in the Courts of this Circuit.

The gravamen of the objections to the M'Naghten Rules is that they are not in harmony with modern medical science which, as we have said, is opposed to any concept which divides the mind into separate compartments—the intellect, the emotions and the will. The Model Penal Code formulation views the mind as a unified entity and recognizes that mental disease or defect may impair its functioning in numerous ways. The rule, moreover, reflects awareness that from the perspective of psychiatry absolutes are ephemeral and gradations are inevitable. By employing the teling word "substantial" to modify "incapacity," the rule emphasizes that "any" incapacity is not sufficient to justify avoidance of criminal responsibility but that "total" incapacity is also unnecessary. The choice of the word "appreciate," rather than "know" in the first branch of the test also is significant; mere intellectual awareness that

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[52] American Law Institute, Model Penal Code (final draft) (1962).

We have adopted the word "wrongfulness" in Section 4.01 as the American Law Institute's suggested alternative to "criminality" because we wish to include the case where the perpetrator appreciates that his conduct is criminal, but, because of a delusion, believes it to be morally justified. See *People v. Schmidt*, 216 N. Y. 324 (1916) (Cardozo, J.).

conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behavior, can have little significance.

While permitting the utilization of meaningful psychiatric testimony,[53] the American Law Institute formulation, we believe, is free of many of the defects which accompanied *Durham*. Although it eschews rigid classification, the Section is couched in sufficiently precise terms to provide the jury with a workable standard when the judge charges in terms comprehensible to laymen.[54] Expert testimony, in short, will be admissible whenever relevant but always *as* expert testimony—and not as moral or legal pronouncement. Relieved of their burden of divining precise causal relationships, the judge or jury can concentrate

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[53] We note that while the Model Penal Code permits, and, indeed, encourages the production of full psychiatric data and information at trial, such testimony can have weight only if the underlying examination of the defendant was thorough. In most instances, one hour of psychiatric examination of the defendant in the House of Detention in preparation for trial is not an adequate substitute for a complete psychiatric and neurological work-up of the defendant in a hospital under the care and guidance of a staff of experts.

Moreover, as we have indicated, for many years psychiatrists have urged, almost with one voice, the replacement of the M'Naghten rule. Their persuasive advocacy of change is now meeting with gradual success, as modern psychiatric theories of normal and deviant personality development and functioning have gained increasing acceptance. It is desirable, therefore, that the altered standard for criminal responsibility which has been adopted today should not become the *causa sine qua non* of unseemly contests between psychiatric experts. We may anticipate a weakening of public confidence in the value of psychiatric concepts and a reaction against them if this should result.

[54] In framing charges, the following caveat is interesting: "I believe that mental disease is a complex and intricate matter and we cannot make it simple and understandable to everyone just by inventing simple words or phrases to describe it." 112 Cong. Rec. 2855 (1966) (Remarks of Senator Thomas J. Dodd).

upon the ultimate decisions which are properly theirs, fully informed as to the facts.

Under the American Law Institute formulation, an inquiry based on meaningful psychological concepts can be pursued.[55] The most modern psychiatric insights will be available, but, even more importantly, the legal focus will be sharper and clearer. The twin branches of the test, significantly phrased in the alternative, will remove from the pale of criminal sanctions precisely those who are in no meaningful sense responsible for their actions.

We do not delude ourselves in the belief that the American Law Institute test is perfect. Perfection is unattainable when we are dealing with a fluid and evolving science. Furthermore, we are aware that the Courts of Appeal for the District of Columbia, Third and Tenth Circuits have not adopted the American Law Institute test *haec verba*, but have employed their own language approaching the objectives of the Model Penal Code formulation.[56] As an illustration, in the scholarly opinion of Chief

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[55] The opportunity that psychiatrists will now have to present their findings and conclusions in their own scientific language should remove a barrier which made such experts reluctant to give testimony in cases turning on M'Naghten. We trust that they will also now make themselves available to be called on for testimony under the provisions of the Criminal Justice Act or where the court may desire the opinion of an independent expert.

[56] New York State, on July 1, 1965, rejected M'Naghten and adopted a test based largely upon the American Law Institute formulation. Section 1120 of the New York Penal Law provides:

> A person is not criminally responsible for conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to know or appreciate either:
>
> (a) The nature and consequence of such conduct; or
>
> (b) That such conduct was wrong.

(Continued on following page)

Judge Biggs in *United States v. Currens, supra,* the Third Circuit adopted the second branch of the Model Penal Code test—substantial capacity to conform one's conduct to the requirements of the law—but deleted the first, referring to "appreciation" of wrongfulness. While we can understand that Court's reluctance to stress the cognitive element of the personality in light of M'Naghten's emphasis on that aspect, we cannot accept its formulation; the gravamen of psychiatric objections to the M'Naghten Rules, as we have seen, was not that they looked to the cognitive feature of the personality, undeniably a significant aspect of the total man, but that they looked to this element *exclusively.* In *Wion v. United States, supra,* Chief Judge Murrah in his thoughtful opinion adopted Section 4.01, but added a proposed jury instruction re-

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(Continued from preceding page)

In addition, Vermont has provided by statute that "The M'Naghten test of insantiy in criminal cases is hereby abolished." Vermont Stat. Anno. § 13: 4802. And in 1957, Vermont enacted as its rule for determining criminal responsibility, a formulation strikingly similar to Section 4.01 of the Model Penal Code:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks adequate capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Vermont Stat. Anno. § 13: 4801.

Connecticut, also, does not adhere to a strict M'Naghten formulation. Its test for criminal competency states:

> To be the subject of punishment, an individual must have mind and capacity, reason and understanding enough to enable him to judge of the nature, character and consequence of the act charged against him that the act is wrong and criminal, and that the commission of it will justly and properly expose him to penalty. *State v. Davies,* 146 Conn. 137, *cert. denied,* 360 U. S. 921 (1959).

It would be incongruous, indeed, if the federal courts which have traditionally concerned themselves with formulating guidelines for fairer trials were to remain frozen to the old M'Naghten Rules while the state courts in this Circuit pursued the more modern and enlightened course.

lating to the defendant's capability of "knowing" what he was doing; for reasons we need not labor, we prefer the Model Penal Code's use of "appreciate" rather than "know."

We believe, in sum, that the American Law Institute test—which makes no pretension at being the ultimate in faultless definition—is an infinite improvement over the M'Naghten Rules, even when, as had been the practice in the courts of this Circuit, those Rules are supplemented by the "irresistible impulse" doctrine. All legal definitions involve elements of abstraction and approximation which are difficult to apply in marginal cases.[57] The impossibility of guaranteeing that a new rule will always be infallible cannot justify continued adherence to an outmoded standard, sorely at variance with enlightened medical and legal scholarship. No one would suggest that a physician-expert called to state an opinion with respect to a litigant's orthopedic or neurological condition should be restricted in his reply to a single isolated cause to the exclusion of other relevant and important findings and conclusions—much less to concepts developed at the outset of Victoria's reign. In a criminal trial, when life and liberty hang in the balance, such arbitrary limitations on expert and jury are all the less defensible.

The genius of the common law has been its responsiveness to changing times, its ability to reflect developing moral and social values. Drawing upon the past, the law must serve—and traditionally has served—the needs of the present. In the past century, psychiatry has evolved from tentative, hesitant gropings in the dark of human ignorance to a recognized and important branch of modern

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[57] See Report, Royal Commission on Capital Punishment, *op. cit. supra* note 42 at 114.

medicine. The outrage of a frightened Queen has for too long caused us to forego the expert guidance that modern psychiatry is able to provide.

VI.

Since Freeman's responsibility was determined under the rigid standards of the M'Naghten Rules, we are compelled to reverse his conviction and remand the case for a new trial in which the criteria employed will be those provided by Section 4.01 of the Model Penal Code.

And lest our opinion be misunderstood or distorted, some additional discussion is in order. First, we wish to make it absolutely clear that mere recidivism or narcotics addiction will not of *themselves* justify acquittal under the American Law Institute standards which we adopt today. Indeed, the second clause of Section 4.01 explicitly states that "the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." We approve and adopt this important caveat.

There may be instances where recidivists will not be criminally responsible, but this will be for determination in each individual case depending upon other evidence of mental disease augmenting mere recidivism with the ultimate determination dependent upon the proper application of the standards we have adopted. But, we stress, repeated criminality cannot be the *sole* ground for a finding of mental disorder; a contrary holding would reduce to absurdity a test designed to encourage full analysis of all psychiatric data and would exculpate those who knowingly and deliberately seek a life of crime.

Nor may narcotics addiction without more be the sole evidence of abnormality under the American Law Institute test. We have observed that the defense of lack of

responsibility is essentially an acknowledgment on the part of society that because of mental disease or defect certain classes of wrongdoers are not properly the subjects of criminal punishment. In light of the severe penalties imposed by Congress for the possession and sale of narcotics, it would be unwise at this stage of medical knowledge, for a court to conclude that those addicted to narcotics should be, for that reason alone, immune from criminal sanctions.

Secondly, in order to avoid any misapprehension as to the thrust of our opinion some mention should be made of the treatment to be afforded individuals found to lack criminal responsibility under the test we adopt. There is no question but that the security of the community must be the paramount interest. Society withholds criminal sanctions in cases of incompetence out of a sense of compassion and understanding. It would be obviously intolerable if those suffering from a mental disease or defect of such a nature as to relieve them from criminal responsibility were to be set free to continue to pose a threat to life and property.

A verdict of "not guilty by reason of incompetency" has, in the past, been equivalent in the federal judicial system to a simple "not guilty" verdict because of the existing void in provisions for commitment and treatment. As a result of the comparatively recent adoption by various federal courts of more enlightened tests of responsibility, we trust that Congress will explore its power to authorize commitment of those acquitted on these grounds.[58] Such was the result of *Durham* in the District of Columbia; shortly after that decision, Congress provided for mandatory post-trial commitment in all cases in the District

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[58] But see, *Pollard v. United States*, 285 F. 2d 81 (6th Cir. 1960).

resulting in acquittals on grounds of lack of responsibility.[59] Pending Congressional action, however, we are confident that the several states will continue to step into the breach as they have in the past. Accordingly, we suggest that those adjudged criminally irresponsible promptly be turned over to state officials for commitment pursuant to state procedures.

Effective procedures for institutionalization and treatment of the criminally irresponsible are vital as an implementation to today's decision.[60] Throughout our opinion, we have not viewed the choice as one between imprisonment and immediate release. Rather, we believe the true choice to be between different forms of institutionalization—between the prison and the mental hospital. Un-

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[59] Krash, "The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia," 70 Yale L. Jour. 905, 940-948 (1960). D. C. Code Anno. § 24-301 (d).

[60] As Professor Wechsler observed, commitment after a verdict of "not guilty by reason of criminal incompetency" is not only desirable but necessary in the sound administration of justice: "* * * I also believe that it is part of any proper system that when a defendant in a criminal case asks for exemption from conviction and condemnation on the ground of irresponsibility, that it is appropriate that there should be as a requirement of law a civil commitment if that defense is sustained. And that, as a matter of fact, is now the law of New York as a result of a statute [N. Y. Code Crim. Proc. § 454] passed two or three years ago. Now, how long should the detention last? Well, it certainly ought to last long enough to allow a full diagnostic study and a determination as to whether it is safe to release the offender from his own point of view and from the point of view of others. The New York statute justified detention on grounds of public danger so long as that danger endures." Remarks, *op. cit. supra* note 39 at 398.

We believe that such institutionalization will deter "normal" defendants from choosing to defend on the ground of irresponsibility. The prospect of commitment to a mental institution for an indeterminate period is much less desirable than a fixed term in prison. See Fried, "Impromptu Remarks," 76 Harvard L. Rev. 1319 (1963). See also Report, Royal Commission on Capital Punishment, *op. cit. supra*, note 42 at 104-5.

derlying today's decision is our belief that treatment of the truly incompetent in mental institutions would better serve the interests of society as well as the defendant's.[61]

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[61] Indeed, the Judiciary Committee of the United States Senate has been concerned with M'Naghten, *Durham* and their progeny. Senator Thomas J. Dodd of Connecticut, a member of that Committee and Chairman of a sub-committee which made an exhaustive study of the operation of *Durham* as refined by *McDonald, supra,* revealed his perceptiveness in a statement on the subject of criminal responsibility. 112 Cong. Rec. 2853-2856 (1966). Senator Dodd recognizing that "the mental patient and his status under criminal law constitute a problem that has defied solution throughout history," nevertheless firmly rejected M'Naghten and cautioned against retreating to its precepts and adopting "less satisfactory procedures because of peripheral rather than substantial difficulties involved in maintaining [Durham]."

Speaking of the need for proper treatment of those found not guilty by reason of incompetency, Senator Dodd observed:

> I do not want the courts to revert to injustice because it is too difficult or too expensive or too inconvenient to make justice work * * * What I am saying is that we should be more concerned with determining whether or not an offender is mentally incompetent than with inventing techniques, definitions and procedural devices to keep insanity pleas to the minimum. * * *
>
> The thin line between criminal responsibility and irresponsibility because of mental disease is not always clearly visible. Thus, we are confronted with questions of policy regarding how we want to react to marginal cases. It seems that the general public and certain segments of the legal profession and law enforcement would like to treat them as criminals rather than as patients. And yet, if we send even marginal cases to the mental hospital and rehabilitate them so that they no longer break the law, we have scored a success. On the other hand, if we send such marginal cases to prison, they may come back to haunt society after their release, more mentally disturbed, more irresponsible, and more crime prone than ever before, because whatever the prison does to men it does not cure mental illness.
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> This is the type of reasoning which has led me to support in principle a rather general and inclusive rule of criminal responsibility instead of a narrow and restrictive one. * * * The important thing is to render the dangerous person harmless. And it is best to do this by correction rather than simply by incarceration. * * *

(Continued on following page)

The New York Times, March 22, 1965.

The Death Penalty Must Go.

The movement, running at full tide across the nation, to abolish capital punishment has received the influential and authoritative support of New York's Commission on Revision of the Penal Code. This bipartisan body, composed of legislators and lawyers, has been at work for four years rewriting and recodifying criminal law, the first complete modernization in nearly 85 years.

Unanimity on this controversial issue was not to be expected, nor was it achieved. But the vote was 8 to 4 for ending the death penalty. The majority report, drafted by Prof. Herbert Wechsler of Columbia, is convincing. It finds that making the state a hangman is "barbarism." It argues that existence of the death penalty has "a seriously baneful effect on the administration of justice," arousing mistaken sympathy for the defendant, even when guilty.

This is a factor that the president of the National District Attorneys Association, George M. Scott, evidently had in mind last week in urging the association to support abolition of the death penalty. He declared that "capital punishment cases make bad law." In many jurisdictions increasing difficulty has been found in getting juries to find defendants guilty because of the cruel finality of the death penalty.

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We must make sure that we do not attack the law when the deficiency, may be elsewhere, for example, in the release procedures from our institutions. * * * By definition, a mentally ill person must be committed to an institution for an indeterminate period of time. We owe the public the protection of keeping him there until cured. * * * I believe this procedure is by far sounder than the "ostrich approach" of sending mentally diseased men and women to prison, hoping that they will be miraculously cured and rehabilitated in a place we know to be traditionally incapable of producing such resurrections.

A major element in the Albany commission's indictment of capital punishment is the ever-present horror of erroneous conviction. With emphatic understatement the report says "such errors cannot be corrected after execution." It notes an inescapable fact that "some erroneous convictions are inevitable," and adds the demonstrated one that error sometimes cannot be established until time has passed.

The minority report offers no proof that the death penalty has special deterrent power against crime, but relies on an effort to alarm the public of dire consequences that might follow abolition. "There is more crime in the State of New York than anywhere else in the world," says the minority.

Yet, it should be observed that the very level of heinous crimes that the minority—and the public no less—deplores exists in a state that does have, and has long had, capital punishment. If capital punishment were, in proved fact, an effective deterrent, then New York surely would by now have a reduced amount of violent crime.

The national concern over capital punishment was dramatically demonstrated last Friday in Tennessee when, after a bill for abolition failed by a single vote in the Legislature, Governor Clement went to the state penitentiary's Death Row and commuted to life imprisonment the sentences of five convicts—three of whom were scheduled to die at dawn the next day.

New York has twenty-one men awaiting death in the electric chair. Maybe they are all guilty, and in their cases there would be no irreversible error. But who could be sure, ever? Their execution will bring no victim back to life. It will simply make the state take a score of lives in an act of retribution that unbearably troubles the public conscience. The Legislature should abolish the death sentence.

Portland Reporter, Portland, Oregon, August 11, 1962.

Secret Shame of Executions.

A grim black-bordered invitation to attend the execution by gas of Leeroy Sanford McGahuey at the Oregon state prison Aug. 20 was reproduced in the Friday editions of The Reporter.

If the execution occurs as scheduled a score or so of persons who have received similar invitations will gather on the walkway around the small lethal gas chamber at 15 minutes past midnight on that day and watch the state of Oregon, under the cloak of legal decree, snuff out a human life. Perhaps half will watch. The others will avert their gaze in sickened shame.

This is in marked contrast to the way executions occurred in Oregon—and elsewhere—two generations ago. A Reporter subscriber tells us of the last public hanging in Wasco county around the turn of the century.

In those days the execution occurred at the county seat where the man was convicted. Our informant recalls that it was an informal holiday in the little town of The Dalles. There was the accustomed preparation—building of the scaffold on the courthouse lawn. And finally the gathering of the crowd. Children and adults, none with a black-bordered invitation, watched as the condemned man, a convicted killer, fell through the trap. It was a grim but very public execution.

In those honest but misguided days the theory in law of capital punishment was that a public execution should be public—and would serve to deter others from a like path of crime.

Today, whether we like it or not, we see the state performing its law-imposed requirement of deliberate taking of a human life under a cloak of semi-secrecy within the prison walls and in such a way that only prison and state

officials and those few invited as witnesses see this atrocious official act.

And the state, by the very fact that it cloaks an execution with the privacy afforded by the grim prison walls, admits that it is publicly ashamed of what it must do under the banner of ultimate justice.

More honest it would be, and more reflective of true attitudes toward capital punishment, if the state conducted its executions, such as it may have, in utter privacy.

For taking human life is wrong. It is against religious and moral principle. It is destructive. And it does not prevent future crime.

It demeans those who, as agents of the state, must perform the deed to the same ethical level as the criminal and killer they are executing.

No wonder, then, that executions today are shrouded in semi-secrecy!

The fact that a potassium cyanide pill does the job instead of the grim noose of yesteryear is no alleviation.

The exercise by the state—or any constituted government—of capital punishment in any form is no preventive of future crime.

Based on experience of reporters who have viewed executions by hanging and by gas we know that most of those who witness that ghastly event at Salem Aug. 20 will be inwardly sickened.

For in this instance man is trying to play God. He is, through the instrument of the state, taking a human life deliberately and under the guise of man-made law.

Authorities have reported that states which have abolished capital punishment have lower murder rates than states which retain it.

Nine states—Alaska, Delaware, Hawaii, Maine, Michigan, Minnesota, North Dakota, Rhode Island and Wisconsin—have no capital punishment.

We would hope that Oregon soon would join these enlightened ranks.

St. Petersburg Times, St. Petersburg, Florida, February 22, 1959.

Capital Punishment Is Medieval.

Gov. LeRoy Collins has announced that he may ask the 1959 Legislature to abolish capital punishment in Florida.

Due to complex tax and budgetary problems, and the emotional confusion which is gripping legislators over school desegregation, the chances of this reform this year cannot be said to be favorable. Enough legislators are rednecked over Governor Collins' firmly moderate policy on desegregation that anything progressive he favors is apt to be buried out of sheer spite.

Nevertheless, we hope that the Governor does make his request so that the process of educating the public on the facts regarding capital punishment may begin.

PENOLOGY HAS THREE proper objectives:

Protection of society;

Reform of the criminal;

Deterrence to others.

Unfortunately, a fourth factor often is included—vengeance.

Vengeance, the blind instinct to hit back at one who has done injury, is a perfectly human reaction. Equally, however, it is totally barbaric and uncivilized. Retaliation, either on the part of the victim of a crime or society itself, is as much outside the moral code as the crime itself.

IN THE CASE OF murder, which is the usual crime punished by the death penalty, although Florida includes

rape—with the ultimate penalty virtually never assessed against a white person—let us consider the above objectives.

Society is protected against a murderer by life imprisonment which is actually for life—something the Legislature can control—quite as much as by execution.

Reform is a somewhat moot point, if the prisoner is actually in for life. Yet statistics prove that murderers are less apt to be "repeaters" when released on parole or at the expiration of term sentences than any other class of criminal.

In New Jersey, for instance, in the past 10 years 117 "lifers" have been paroled and not a single one committed another murder, and only 8½ per cent violated their paroles in any way.

THIS BRINGS UP the matter of deterrence. The most vigorous arguments advanced by those favoring capital punishment is that it deters crime—that potential murderers are worse scared of the death penalty than anything else.

The record absolutely refutes this argument. Six American states have had no death penalty for the past 30 years (Delaware abolished it last year). Studies at five-year intervals show the following:

The homicide rate per 100,000 population in the non-death penalty states has ranged from 4.2 to 2.1—not higher than 2.2 in the past 20 years. In the death penalty states the range has been from 5.5 to 10.5—averaging 6.3 since 1938.

The record in 40 foreign nations which have abolished the death penalty has been similar. It is unmistakably clear that if abolition of the death penalty actually does not reduce the homicide rate, at least it does not increase it.

THIS LEAVES VENGEANCE as the only excuse for the death penalty—sometimes defended on the "eye for an eye, tooth for a tooth" principle. Yet it is notable that even the leaders of modern Jewry repudiate this Old Testament concept. And certainly it has no place in the Christian ethic.

There is no need to stress such further points as the fact that there have been all too many occasions when the innocence of a person has been proven beyond question—after the execution.

It is enough—at least it should be enough—to say that a civilized people and a civilized state should not tolerate this medieval remnant of a social system not too far removed from barbarism.

Memphis Press-Scimitar, Memphis, Tennessee, October 28, 1958.

Serious Thought on Death Sentence by Robert Johnson.

Why must the condemned man in the electric chair die in darkness? They put a black mask before his face.

Is it to keep him from seeing where he is going?

Well, said the prison official matter-of-factly, the 2000 volt jolt at 8-to-10 amps makes his brain reach the boiling point of water, and the body gets to smoking and pretty charred up.

"You can just imagine what happens to the face."

So the mask is not for the benefit of the dying man, but out of consideration for the feelings of the witnesses required by law.

WHY ANONYMOUS?

Why must the executioner be anonymous? Is there anything about his calling of which he should be ashamed?

The soft, infinitely concerned voice asking these ques-

tions was that of Joseph N. Welch, the famed Boston attorney who became particularly known for his part in the Army-McCarthy hearings, and the program was Omnibus, which returned Sunday for its seventh season.

Why must the executioner be ananymous? "We like to think it is some impersonal thing called the State," Welch said. "That is not so—a hand must throw a switch, or push a button, or pull a trap.

"The hand is yours and mine."

At the beginning of the program, parents were warned that parts of it might not be suitable for children. This perhaps drew more children than would normally have watched, and I think this is good. The more people who saw this the better.

Mr. Welch in what was quite probably the most important case of his career—brilliantly prosecuted an idea—capital punishment.

PURPOSEFUL ATTENTON

The arguments on behalf of capital punishment were given attention, but only for the sake of knocking them down. This was a quiet and damning accusation of man for killing part of himself. If parts of it were brutal and morbid, it was because we cannot have any strong conviction about the legal taking of life without knowing some of the facts about it.

This program was the result of months of research, and the words of the prison personnel were actual quotes, although delivered by actors. James Lee, the playwright who wrote the Life of Samuel Johnson production for Omnibus last year, prepared the dramatic vignettes.

Mr. Welch took as his thesis that if the purpose of capital punishment is to deter, we are defeating that purpose by shrouding the manner of it in secrecy.

We should have public executions, he argued in his quiet way, as they did before we became civilized.

Once a Social Outing

In old, uncivilized days, an execution was the excuse for an afternoon's outing. Just 200 years ago in England, a 7-year-old girl was hanged for stealing tuppence ha-penny. In 1839 in this country, a 12-year-old boy was hanged for stealing a sheep. In these enlightened days, we execute no one under 18.

Curiously, at hangings of pickpockets, other pick-pockets industriously plied their trade, waiting for the moment when the crowd's attention was focused on the climactic event and attention diverted.

The death penalty did not seem to be fulfilling its purpose, Mr. Welch said dryly.

Statistics? In this country, there are about 7000 murders annually, and about 7000 different kinds of murderers. The majority are between 21 and 35 and have committed no previous crime. There is usually too much to drink, and the favorite time for murder is between 8 p.m. Saturday and 2 a.m. Sunday.

Reasons for Outbreaks

Some biologists argue that the reason for outbreaks of violence frequently lies in a chemical embalance—too much calcium in the system, perhaps, or too much sugar in the blood.

But the law asks only did the accused know the nature of his act.

Maine, which abolished capital punishment in 1887, has the lowest criminal rate. Georgia, where 14 crimes are punishable by death, has one of the highest.

Seven states have abolished capital punishment. They

are Michigan, 1846; Rhode Island, 1852; Wisconsin, 1853; Maine, 1887; Minnesota, 1911; North Dakota, 1915; Delaware, 1958.

The Oregon Legislature has voted to abolish capital punishment, in unanimous Senate vote, and Oregon will vote on it Nov. 4.

Mr. Welch noted that some states and nations have abolished capital punishment and later restored it.

SOME RESTORED IT

Italy restored it, he said, under Mussolini.

Austria restored it, under Hitler, who put the executioner in a high silk hat.

Soviet Russia restored it—"and in 1954."

Mr. Welch said: "Look about you and see who is on your side."

Right up to the last moment, condemned men refuse to abandon hope. At the last moment, they ask for a piece of paper and a pencil and they scribble something like: "I am innocent." They think that will save them.

"Nobody believes it can happen * * * and there goes your deterrent."

In the gas chamber, they try as long as possible to keep from taking that last breath.

In less enlightened days, men were pressed to death under weights, starved slowly on slops, drawn and quartered, burned to death.

"We have become merciful," said Mr. Welch.

This was one of the most horrible and most beautifully compassionate programs I have ever seen.

Broadcast by Chet Huntley, NBC News, with Emphasis . . . Plain Talk, March 8, 1965.

The Death Penalty.

There is a chance that before this year is out, capital punishment in the United States will be on its way out * * * relegated to an unenlightened and semi-barbaric past. The State of Iowa recently set it aside. The State of Indiana may do so sometime this spring. If Indiana should give up capital punishment, it would be the 11th state to do so. Leaders of the New York State legislature have declared that there is a good chance capital punishment will be outlawed before the year is finished. Gov. Rockefeller recently hinted that he would look upon such a bill with some sympathy. Although legislation to put aside capital punishment has been narrowly defeated on several recent occasions in the legislature of California, the opponents of it are rallying for another try. Governor Brown of California is strongly in favor of its elimination and the judiciary of California is overwhelmingly demanding that the practice be dropped.

There is no question but what there is a new revulsion against the death penalty as a function of our system of justice. We simply are not executing criminals as we did formerly. There are today 21 persons awaiting execution in New York's Sing Sing prison. There are about an equal number in Death Row at California's San Quentin. Some of these men have been under sentence of death for as long as six or seven years. Charles Glinton has been in Sing Sing's version of death row for six years. His date of execution is now set for this coming April 1st. It could well be that the Governor will stay the execution, at least, until the state legislature determines whether or not it will take action upon a bill this year to outlaw capital punishment.

Another wave of revulsion against the death penalty must have swept through this country recently when a confession of brutal murder, extracted from a New York youth, turned out to be false and invalid. It occurred to many that if the state had been given a little more time it might have sent him to the electric chair to find out later that it had killed an innocent man.

The evidence is virtually conclusive that the death penalty is not a deterrent to crime. It is costly and degrading. The admonition "Thou shalt not kill" has no qualifications to the end that society may ask itself by what rule does it secure justification for the taking of human life.

The best known and most respected penologist of this country, Clinton Duffy, former warden of San Quentin, says the death penalty is such a consummate waste, because in every man, no matter how immoral or degraded or cruel, there is some value which he can render to the society he has wronged.

The American Civil Liberties Union Statement on The Death Penalty & Civil Liberties.

THE AMERICAN CIVIL LIBERTIES UNION believes that capital punishment is so inconsistent with the underlying values of a democratic system that the imposition of the death penalty for any crime is a denial of civil liberties. We believe that past decisions to the contrary are in error, and we will seek the repeal of existing laws imposing the death penalty and the reversal of convictions carrying a sentence of death.

Capital Punishment in Operation Results in Denial of Equal Protection of the Law.

The existence of the death penalty for crimes results in discrimination against the poor, the uneducated and the Negro. In the last three and one-half decades, 53.7 per cent of all persons executed in the United states have been Negroes, even though Negroes represent only 10 per cent of the population. The discrimination is even clearer when comparison is made of the imposition of the death penalty upon those convicted of a capital crime. A study of a northern state (Ohio) shows that 78 per cent of all Negroes so convicted were executed, but only 51 per cent of whites so convicted were executed.

The disproportionately large number of executions of members of the Negro race indicates that this penalty is often imposed as the result of racial bias. Certainly no statute could require that the death penalty be imposed upon a Negro, but not upon a white person, because such provision would be a denial of equal protection of the law. A law which permits such a result is also an unconstitutional denial of equal protection of the law.

There is also evidence of a compelling nature that the death penalty is more likely to be imposed upon one

who is poor, regardless of his race, than upon one who has significant financial resources. For example, a rich man accused of a crime may avoid the death penalty by employing legal counsel and compensating him fully for the extensive time necessary to pursue the mutiple remedies available to those under penalty of death. A poor man, while given the right to counsel, has only that counsel which is volunteered, or which is either compelled or compensated by the state. While such publicly provided counsel is almost always dedicated, it is unrealistic to believe that such counsel can give the kind, range and detail of service which can come from those compensated at the usual rate paid the most competent lawyers of our time. To make punishment of the irrevocable and final nature of death depend upon the availability of funds is clearly a denial of equal protection to the man whose funds are inadequate or nonexistent.

In the case of capital punishment today, the punishment does not fit the crime. It is instead punishment directed almost exclusively to the most disadvantaged members of society. Capital punishment is in fact, therefore, a constitutionally prohibited denial of equal protection of the laws.

IMPOSITION OF THE DEATH PENALTY FOR COMMISSION OF A CRIME IS CRUEL AND UNUSUAL PUNISHMENT.

Although the Supreme Court has in the past said that "the punishment of death is not cruel, within the meaning of that word as used in the Constitution" (*In Re Kemmler*, 119 U. S. 436 at 447), we believe the time has come to reassess this judgment. As the late Mr. Justice Burton said in his dissent in *Francis v. Resweber*, 329 U. S. 459 at 472, "Abhorrence of the cruelty of ancient

forms of capital punishment has increased steadily until, today, some states have prohibited capital punishment altogether."

The fact that capital punishment has been acceptable in the past is no reason for its continuation. The rack and the screw; drawing and quartering; flogging—all have been used and subsequently rejected as maturing and sensitive notions of the essential commands of human decency demonstrated the barbarity of the practices.

Certainly evolving standards of decency that mark the progress of maturing society have led to a reexamination of the assumption, so long made, that capital punishment does not violate the Eighth and Fourteenth Amendments to the Constitution. The Supreme Court acknowledged in *Weems v. United States*, 217 U. S. 349, that the Eighth Amendment is dynamic in its meaning, not static. The Court said, "Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth."

To ask today the question whether the imposition of the death penalty is cruel is to answer it. Anglo-American law, and indeed much of human experience, has been devoted to postponement of death. So committed is the society to the maintenance of life that it does not permit the life of a hopeless invalid to be taken in order to end the greatest of pain. If society's respect for life denies men the right to take life in order to prevent or end pain, or because one is tired of life, surely the state should not be permitted to take a life in order to punish for past behavior.

General public abhorrence of the death penalty is manifest in the reduction of the number of executions each year. So repugnant has the death penalty become

that twelve states have either outlawed or narrowly limited the imposition of the death penalty.

Contemporary discomfort with the death penalty is further revealed by the reversal of guilty verdicts for technical errors which to laymen and lawyers both seem simply to reflect the courts' apprehension that to permit the judgment to stand would result in the ending of a life.

To retain the theory that imposition of the death penalty is not cruel is to ignore the persistence of individual and collective conscience which says that death imposed by the force of the state is the ultimate cruelty insofar as the person whose life is taken is concerned.

Because the poor man and the member of the minority group are the most likely to be the victims of a death penalty, the punishment is, as to the rest of the society, not only cruel, but also unusual. It is, for most members of the society, a punishment that the society for reasons of conscience refuses to inflict.

We believe, therefore, that contemporary notions of the significance of human life make imposition of the death penalty cruel and unusual punishment prohibited by the Constitution of the United States.

IMPOSITION OF THE DEATH PENALTY IS A DENIAL OF DUE PROCESS OF LAW BECAUSE OF FUNDAMENTAL UNFAIRNESS.

The irreversibility of the death penalty means that error discovered after the penalty has been imposed cannot be corrected. Thus one who suffers the death penalty, and subsequently is found to have been improperly convicted, has been denied due process of law.

In one sense, moreover, the death penalty is in and of itself a denial of due process. Life is the *sine qua non* of the right to due process. A dead man cannot be given due process. A dead man has no rights. The right to have rights—the right to due process—depends upon the exist-

ence of life. The state should not be permitted to deprive the citizen of all rights—including the right to have rights—by taking his life for any reason.

In addition, the operational facts surrounding the imposition of the death penalty reveal fundamental unfairness to the interests of one accused of a capital crime. For example, jury panels in capital cases are selected partly on the basis of a belief in the death penalty. A juror opposed to the death penalty may be struck from the jury panel, so that the state is protected from a jury biased against the death penalty, but the defendant is not protected against a jury biased in favor of the death penalty. Such bias on the side of the state in taking a human life is fundamentally unfair.

The existence of the death penalty also has a deleterious effect on the administration of justice, which prejudices the defendant. The incentive of a capital conviction often produces police lawlessness in the use of the "third degree" and other forms of coercion in order to obtain confessions or evidence for the prosecution. Similarly the zealous prosecutor in capital cases tends not merely to argue the evidence of guilt or innocence, but to advocate the need to exterminate the accused, hardly an objective pursuit of justice. And the blatant, emotional and detailed coverage given by the mass media to capital crimes, eagerly digested by the public, can make a fair trial almost impossible.

There is the further special problem in capital cases raised by the negotiating process frequently carried on between the prosecution and the defense in all criminal cases. For the defendant to make a "rational" decision when he bargains with the prosecution, the issue is not whether he is in fact "innocent" or "guilty" but rather what is the *probability* that he will be found guilty or not guilty. Thus, the innocent defendant cannot afford to

dismiss the negotiating process without taking a cold and calculating look at the strength and weakness of his case as it will be viewed by the court and jury. The defendant who is "guilty" must do the same. And so must the defendant who knows not whether he is "innocent" or "guilty."

In capital cases this dilemma is especially grisly because the defendant's life is at stake, and the pressure to make a deal with the prosecution may be irresistible even though the defendant is innocent. This is hardly conducive to the fairness we expect of our judicial system.

Capital Punishment Not Acceptable in Light of Present-Day Standards of Justice and Humanity.

Underlying all of the foregoing considerations is the judgment of the American Civil Liberties Union that the imposition of death as punishment for a crime, regardless of the nature of the crime, is inconsistent with today's standards of justice. Because we believe the death penalty to be an injustice in practice and in concept, we also believe that it is—and will one day be declared to be—unconstitutional. We believe that the death penalty is inconsistent with the underlying values of the Constitution of the United States—the protection of the pursuit of life, liberty and happiness of the citizenry—and is therefore a denial of due process.

Legislative and Executive Action to Be Sought.

The American Civil Liberties Union will seek elimination of the death penalty not only through the courts, but also through legislative action to repeal existing capital punishment statutes. In addition, we shall seek, as a matter of civil liberties concern, the commutation of death sentences, until such time as the death penalty is eliminated as a part of the law and practice of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 476.

JOHN ELMER WOODARDS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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JOHN ELMER WOODARDS,

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STATE OF OHIO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

John Elmer Woodards, the petitioner herein, was indicted on July 23, 1963, for Murder in the First Degree, under Ohio Revised Code Section 2901.01.

The petitioner was duly arraigned and entered a plea of not guilty and not guilty by reason of insanity. (R. 1117.)

Trial by jury commenced on January 20, 1964 (R. 6) and ended on January 31, 1964, wherein the jury returned a verdict of guilty, without recommending mercy (R. 1156). Petitioner was sentenced to be electrocuted on May 15, 1964, by the Warden of the Ohio State Penitentiary (R. 1159), in accordance with Ohio Revised Code Section 2901.01, wherein the death penalty is mandatory when the jury trying the accused does not recommend mercy.

The record reveals that Mrs. Julia Impiccini, a neighbor who assisted Mrs. Margaret Van Arsdale, deceased, in her household duties, discovered her body on the morning of July 13, 1963, wrapped in a blanket. (R. 29.)

Dr. Robert Thomas, Deputy Coroner, a pathologist, performed the autopsy on the same date (R. 136) which revealed that there were lacerations of the chin, of the upper lip, areas of bruising and laceration behind the left ear, fracture of the left clavicle, bleeding from the area of the genitalia, and an area of abrasion and bleeding on the decedent's back. (R. 135.)

As to cause of death, there were several items, any one of which in itself could have been the cause of death; the most important was a crushing of the chest, rupture of the spleen, multiple hemorrhages and fractures throughout the body, hemorrhage into the lungs resulting from perforation by fractured rib end, fractures of all ribs on both sides (R. 137), hemorrhage into each chest cavity and the pleura (R. 138) and extensive hemorrhage and bleeding into the retroperitoneal tissues, spleen torn into two separate parts, genitalia extensively damaged, lacerations which extended from the vagina posteriorly to the mucosa of the anus up both sides of the wall of the vagina from the entrance of the vagina to the cervix, fracture of the distal portion of the right fourth finger, and fracture of the collar bone. (R. 140.)

The Lorain County Sheriff was notified of the discovery of the body of Mrs. Van Arsdale, age 85 years (R. 43), and a deputy sheriff arrived at the scene before 11:00 a.m. (R. 274.) Shortly thereafter other members of the Sheriff's Department, the Lorain County Prosecutor and an Assistant Prosecutor, and the Deputy County Coroner arrived at the scene and the investigation commenced.

Deputy Sheriff Michael Ondreyco talked to Mrs. Impiccini, Mrs. Miller, Mrs. Geiger, Deputy Gehrke and Deputy Zieba (R. 379) and instructed a Deputy to pick up the petitioner, after discovering that the petitioner had

been a tenant in an upstairs apartment in the house where the body was discovered, who had left owing back rent after having done considerable damage, and avoiding a warrant of arrest of the petitioner for assault and battery and questioning of petitioner in connection with several burglaries. (R. 434-435.)

At approximately 2:00 p.m. on July 13, 1963, the petitioner was in custody and inquired of for two to three hours by Mr. Paul J. Mikus, the County Prosecutor, and a few minutes by the deputies. (R. 437.) The petitioner was not questioned on Sunday, July 14, 1963. Further investigation on July 14, 1963, at the premises revealed that a left palm print was discovered by a technician of the Cleveland Police Department (R. 441) and petitioner consented to giving a print, which was identical to the palm print found on the bedstead in the Van Arsdale home (R. 528), and again proved identical. (R. 530.)

On Monday, July 15, 1963, Mr. Ondreyco continued the inquiry from 1:15 to 1:55 p.m. and at 2:10 p.m., Assistant County Prosecutor John B. Otero continued to question the petitioner and recalled Mr. Clemento, the Court Reporter. (R. 384.) Petitioner admitted by stating, "I don't know why I did such a thing." (R. 288.)

Petitioner was apprised of his Federal and State constitutional rights by a deputy sheriff and assistant county prosecuting attorney as shown on R. 287 and R. 288.

Petitioner consented to re-enact the crime (R. 398) and Deputy Sheriff Lois Carson made a record of questions and answers.

Mr. Ondreyco introduced Mr. Clemento, the Court Reporter, stating that he had already advised the subject that he did not have to make any statement. (R. 385.)

Lois Carson also testified (R. 965) on lines 9 to 14, "Mr. Ondreyco asked all questions with the exception of

the statement on whether he understood that all statements would be used against him—or could be used against him, which statement was made by Mr. Otero."

In the petitioner's writ of Certiorari, on pages 8 and 9, it is stated that a Deputy placed him under arrest in connection with a fictitious service station robbery and cites R. 588, which is not supported by any testimony on said page.

The petitioner made an admission on July 15, 1963, after 2:00 p.m. and therefore could not have been charged and arraigned before noon on that date as stated in petitioner's brief. (p. 11.) The inquiry at the County Jail was completed after 3:30 p.m. and the petitioner agreed to re-enact the scene of the crime, which is some fifteen (15) miles from the County Jail. He was returned to the City of Elyria, Ohio, and about 6:15 p.m., the same date, he was charged and arraigned before the Elyria Municipal Court. Less than four hours had passed from the time of the discovery of his commission of the crime and arraignment.

Petitioner was represented by counsel, who waived a preliminary hearing and was bound over to the next session of the Lorain County Grand Jury.

At the trial, two eminent expert psychiatrists testified that petitioner knew the difference between right and wrong after examining the military records of the petitioner and examinations at the Lima State Hospital, which conclusions appear on R. 719 as follows:

> "Patient is not mentally defective nor psychotic nor a psychopath. He is legally sane, which means that he understands the charges against him, that he understands right from wrong, and that he is able to cooperate with his defense lawyers toward his defense."

Dr. Maurice D. Friedman, eminent psychiatrist who was called by petitioner, further testified (R. 723) that he considered and did not disagree with the psychiatric examination made by Captain Robert A. Pithian, M.D., U. S. Army, which reads as follows:

> "This soldier is not psychotic or neurotic and has no psychiatric condition which warrants disposition through medical channels."
>
> "He was and is medically responsible to distinguish right from wrong and should be able to adhere to the right and refrain from the wrong."

Dr. Gill, another eminent psychiatrist, agreed with Dr. Friedman that Woodards was a constitutional psychopath and further testified (R. 910) that a constitutional psychopath has the capacity to control himself, he just doesn't use it.

Petitioner appealed to the Ninth Judicial District of Ohio, which affirmed the conviction, to which decision, the petitioner appealed to the Ohio Supreme Court.

The Ohio Supreme Court also affirmed the conviction and this respondent requests a denial of the petition in this Court seeking relief for a writ of certiorari.

REASONS FOR DENIAL OF THE WRIT.

I.

Petitioner was duly charged, tried and convicted of First Degree Murder under Ohio Revised Code Section 2901.01, and the Ohio Constitution makes Murder in the First Degree a capital offense under Sections 9 and 10 of Article I.

Trial was had according to the following salient sections of the Ohio Revised Code:

2945.10 Order of Proceedings.
2945.11 Charge to the jury as to law and fact.
2945.16 View of the premises.
2945.17 Trial by jury.
2945.171 Verdict in writing.
2945.18 Venire for jury in capital cases.
2945.19 Special venire in capital cases.
2945.21 Peremptory challenges in capital cases.
2945.34 Admonition if jurors separate during trial.
2945.35. Paper the jury may take.
2945.37 Inquiry into insanity of defendant.
2945.38 Proceedings on finding or verdict.
2945.39 Plea of insanity as a defense.
2945.40 Expert witnesses in insanity cases.

Respondent contends that all the above sections were properly applied during the trial, and therefore, there was not a violation of the 8th and 14th Amendments to the United States Constitution.

The reasons cited by petitioner for granting a writ of certiorari at best can be summed up as a dissertation against capital punishment.

The principal need for capital punishment is that it deters others from killing human beings, thus saving innocent lives.

A survey conducted in 1965 by a commission in New York State to revise its penal code, revealed that not a single case of the wrong man being executed after reviewing 614 executions in that state since the introduction of electrocution in 1891.

One of our greatest jurists, the Honorable Learned Hand, in 1923 made a statement as follows:

> "No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the armchair formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."[1]

Richard H. Kuh, Co-Ordinator of the New York State Combined Council of Law Enforcement Officials, stated the following in the NDAA Journal of the National District Attorneys Association for July-August 1965:

> "That argument is specious on both grounds: private citizens *do*—under limited circumstances—have the right to take life; and whether or not they do, society is authorized to do many things not permitted to the citizenry. Specifically, G. I.'s fighting in Viet Nam, are not only *permitted* to kill, but are *ordered* to kill. Apart from war, a police officer pursuing an escaping felon may take life. A private citizen, who is attacked and whose life is in danger, may—meeting force with force—take the life of his assailant. These are circumstances, that exist today, in which private citizens have both the moral and the legal right to kill.

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[1] *United States v. Garssen,* 291 Fed. 646 (S. D. N. Y. 1923).

There are circumstances, too, in which the community has greater authority than has any private citizen in terms of depriving wrong doers of sacred rights. The Declaration of Independence tells us, for instance, that all men are endowed "with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The private citizen cannot deprive another of these rights; yet the community, daily, in the criminal courts, deprives persons of "Liberty," and of "the pursuit of Happiness." By the same token, the community has, traditionally, been permitted, in capital cases, to deprive its citizens of "Life."

First and foremost, does the death penalty deter prospective killers? Deterrence cannot, it is conceded, be statistically proven. There are no significant figures to be considered. Homicides happen to one or two or three persons per hundred thousand in population (one, or two, or three one thousandths of one percent). When cut that fine, the figures are so tiny as to have little statistical meaning when one is dealing with the varied motivations of human beings. But there are other non-statistical bases for analyzing deterrence.

First, as to common sense:

If slight punishment deters, greater punishment is a greater deterrence, and the ultimate punishment should be the ultimate in deterrence. Not to everyone of course: there are some people, some prospective killers, whom nothing can deter. If any prospective murderers can be deterred, however, to that extent innocent persons may be saved. The question is: if we retain capital punishment, will one or more innocent persons who might otherwise be killed, be spared?

The greatest single fear that is common to all mankind is the fear of death. One of the foundation

stones of religion or at least the religious activity of many people, is the fear of death, of the uncertainty of what is to come after life has been terminated. When we talk of the drives for shelter and for the satisfaction of hunger, we are talking of particular aspects of the more basic drive for self-preservation. In light of the enormity of the fear of death, and of the resultant drive for self preservation, it counters good common sense to maintain that these drives are inadequate to deter *some* potential killers from taking life.

Second, as to experience:

We know that after the Lindbergh Law was passed, making kidnapping punishable by death, the incidence of kidnapping dropped markedly in this country.

Prosecutors, with some frequency in New York, find robbery cases in which the crimes were committed with unloaded guns. Why? The New York State Legislature has not made it illegal to sell ammunition to persons without gun permits, nor is it unlawful to possess such ammunition. Yet it is unlawful to carry, unlicensed, a concealable weapon. Why then do felons commit robberies with unloaded guns when ammunition is easily secured, lawfully, but the gun can only be purchased clandestinely, in a criminal transaction? An armed robber, convicted as a first offender in New York State, faces a mandatory minimum of ten years imprisonment, and a maximum of thirty years. If he is a second offender, the maximum is sixty years. Eluding capture, then, is important, and a loaded gun is likely to aid escape far more effectively than is an unloaded one—a dummy weapon. One *must* conclude (and robbers, when questioned, have confirmed this) that when empty weapons are carried it is because the perpetrators recognize that in the excitement, in the alarm, in the unforeseen incidents that may accompany any felony, the stick-up men don't want to find they have killed someone,

and *hence face the electric chair*. Eternity is far more foreboding than is thirty or sixty years.

The abolitionists have drama on their side. In New York State, for instance, twenty-one men are in the death house in Sing Sing. All have names, ascertainable background, a variety of known personalities; some have wives and children. These known lives are being weighed against nameless, faceless, unknown, unidentifiable, uncountable shopkeepers, against unspecified people walking the street—or riding subways—at night, and in the daytime. Identities give the first group dramatic and emotional appeal. The second group, amorphous and vague, is lacking in such dramatic impact. One basic consideration should shift the balance, however. The faceless and uncountable ones are all *innocent*; the twenty-one known killers have all been found guilty; before they are executed—any who are to be electrocuted—their convictions will have been affirmed on appeal, and affirmed and reaffirmed under collateral attack.

Most in law enforcement urge, for the present, the wisdom of doing what can be done to protect the innocent, the faceless, the uncounted, even though it means taking the lives of the known and identifiable.

One of America's greatest judges, a venerable figure in our judicial history who, as a young man in the Civil War knew intimately the carnage of battle, Oliver Wendell Homes, in 1925 wrote to Harold Laski:

> 'If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, I don't doubt that your action was inevitable for you, but *to make it more avoidable by others* we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.'

Clearly, this leader of our great liberal tradition believed solidly in the deterrent effect of capital punishment. Has anything since transpired to show him in error?

Apart from deterring potential killers who are at large, the death penalty deters the caged felon from killing to gain his freedom. The life prisoner may be deterred—by visions of the chair—from killing his keeper; the cornered fourth offender, being taken into custody, may be deterred from killing his policeman captor.

Moreover, the executed murderer can never kill again. Several years ago, in New York State, Fredrick Wood, a paroled killer, killed twice again within thirty days of gaining his freedom. More recently this was done by a defendant in California who was saved from the gas chamber by a new trial.[1] A person today serving a New York life sentence is eligible for release in less than twenty-seven years, and in other states the average life term is as low as ten years.

There is, of course, no way that society can guarantee that a killer will be kept imprisoned. Although at the time of trial, and at the time of appeal, and at the time of collateral attack, a host of courts have found that a man's conviction was fair, and proper, and just, and that he was given all the procedural safeguards that exist in the law, we know that two days from now—or two, or twenty-two, years from now—new judges may change the law, engrafting upon it new requirements not even dreamed of today, not bearing on innocence or guilt and that such changes may be given retroactive effect.[2] These completely unforeseeable and hence unavoidable switches, quite apart from parole pos-

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[1] *People v. Morse*, 388 P. 2d 33 (Cal. 1964).

[2] See, for instance, *Jackson v. Denno*, 378 U. S. 368 (1964) and *People v. Huntley*, 15 N. Y. 2d 72 (1965).

sibilities, may set loose dangerous and concededly guilty killers, to prey again upon their communities.

A few years ago, when Adolph Eichmann was kidnapped and brought to Israel he represented no danger to the people of Israel. From thousands of miles away he had to be smuggled into a land he had never seen in order to be tried and executed. His execution was not to deter, nor to safeguard, but to avenge—a nation, and indeed a world, sought vengeance.

A shocked nation learned of the assassination of President John F. Kennedy. Following the Warren Commission's report, legislation was introduced in the Congress specifying the death penalty for a presidential assassin. This is hardly to deter; if the cordon of armed secret service men that surrounds a president, ready to shoot any attacker on the spot, does not deter, legislation is not likely to do so. Clearly, the pending federal bill seems designed simply to avenge.

Enlightened thinkers may decry vengeance, but they recognize that it exists. A distinguished psychiatrist, Dr. Smiley Blanton (personally opposed to capital punishment), in a letter to the New York Herald Tribune on April 3, 1960, wrote:

> 'As a psychiatrist my experience teaches me that in the unconscious mind there is so much hate and guilt that people will find a certain satisfaction in having criminals executed by the state.'

We are dealing with human beings, *human* by definition, and retaining these primal drives.

One may join the abolitionists in disowning vengeance, and in wishing we might rise above it. But is not its propriety for the community to judge? Who can say *with certainty* that the community, as represented on the jury (in the majority of states in which the jury alone determines when the death

penalty is to be inflicted), is wrong and has no right to express vengeance when it sends callous multiple killers to the electric chair?

We are living in an era of great chaos and lawlessness. Crime alarms and terrifies more and more people; it seems omnipresent. Some reaffirmation is now badly needed of the strength of the law, of its massive omnipotence, of its awesomeness. Retaining capital punishment constitutes one such reaffirmation.

For the present the death penalty should be retained; it should be available to jurors to invoke—by their unanimous action only—in the case of the multiple murderer (both the person who kills and is sentenced and is then released and kills again, and the person who goes on a murder spree and kills six people within a week). It should be available to deal with the killer for hire—the Murder, Incorporated minion. It should be retained and available for the felon who, to escape what may be a life sentence, kills a prison guard or kills a police officer. It should be available to deal with the mugger and the rapist who, facing sentences so long that they are equivalent to today's life sentences, determine to kill the one witness who may identify them.

The simplest and most logical way of retaining capital punishment so that it can be invoked in the appropriate cases would seem to be through the bifurcated trial. This gives both sides the opportunity, after the question of guilt has been disposed of, to let the jurors know everything relevant about the defendant. They are thus able to intelligently separate out who is to go to the chair and who isn't.

This sifting by the community, rather than a legislative pre-sifting that excludes certain murders from the area of capital crimes, is most logical and is likely to be most satisfactory.

But if our legislatures believe the death penalty should go, this is a question uniquely suited to decision by plebiscite of the electorate, and the lawmakers should submit the question directly to the public.

If the electorate has to make this decision, this will force a "great debate"—a debate that will inform and directly involve the people in this decision. They have a stake in the outcome: their lives are involved, as is their interest—if any—in avenging heinous murder and deterring potential murderers. The question is so unique, so grave, so fraught with public emotion, that it would not be an improper declination of legislative responsibility to submit it to the voters.

Ten states have abolished capital punishment, and—within a few years—restored it. Several have again abolished it. The decision of whether or not to take a life is one a state should not make because of a whim or of a Whitmore. It is a decision that, once made, should not be recanted because of an egregious murder. Making the change pursuant to a plebiscite would minimize the chance of vacillation. (Clearly there could be no objection to a moratorium on electrocutions while this fundamental decision was being made by the electorate.)

Whether or not the electorate, after casting its ballots, favors the retention of the death penalty, we should be assured by this state-wide plebiscite that Mr. Justice Holmes' 'first requirement of a sound body of law * * * that it should correspond with the actual feelings and demands of the community,' will have been met."

II.

The standards set by the M'Naghten Test of Criminal Responsibility do not violate the Fourteenth Amendment.

In the trial there was a factual determination of the Petitioner's mental condition by two (2) eminent psychiatrists, who testified that the Petitioner knows the difference between right and wrong. (R. 706, 707, 894 and 895.)

In addition to the above testimony the Petitioner introduced the United States Army records which only the Petitioner could procure, which substantiated that he knew right from wrong during his service in the United States Army.

In accordance with Ohio Revised Code Section 2945.39 governing pleas of insanity as a defense, the Petitioner was sent to the Lima State Hospital for examination, observation and evaluation. The Petitioner was found to be legally sane and knew right from wrong.

In determining whether a person was legally insane at the time of the criminal act, the concept of mental disease has been an important factor since the *M'Naghten* rules[1] were formulated in England by the House of Lords over a century ago.

Today our courts give great credence to two (2) modern insanity tests; the *Durham*[2] and the Model Penal

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[1] "To establish a defense on the grounds of insanity, it must be clearly proved that, at the time of the committing the act, the party accused was laboring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." *M'Naghten's Case,* 10 CL. & F. 200, 210, 8 Eng. Rep. 718, 722 (H. L. 1943).

[2] *Durham v. United States,* 214 F. 2d 862, 875 (D. C. Cir. 1954).

Code,[1] that require that the criminal act be "the product of" or "result of" mental disease or defect, thus placing even greater emphasis on mental disease than those of *M'Naghten.*

These points are cited only to provide a logical perspective so that the importance of the term "mental disease" and its relation to criminal law may be observed.

An examination of all the evidence and testimony in this case reveals that the Petitioner unquestionably was sane, knew right from wrong and therefore, the essential holdings set out in *Durham v. United States,* 214 F. 2d 862, cannot govern this case unless there is shown: 1, That the trial court did not correctly apply existing rules governing the burden of proof on the defense of insanity, and, 2, that existing tests of criminal responsibility are obsolete and should be superseded.

In *Carter v. United States,*[2] the Appellant's conviction for First Degree Murder discussed the insanity test only for the purpose of guidance in the second trial. The Court stated:

> "Mental "disease" means mental disease. Mental illnesses are of many sorts and have many characteristics. They, like physical illnesses, are the subject matter of medical science. The problems of the law in these cases are whether a person who has committed

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[1] Model Penal Code (Proposed Final Draft No. 1, 1961). Section 4.01 Mental Disease or Defect Excluding Responsibility.

(1) A person is not responsible for criminal conduct if at the time such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

(2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

[2] *Carter v. United States,* 252 F. 2d 608, 617.

a specific criminal act—murder—assault—arson or what-not—was suffering from a mental disease, that is from a medically recognized illness of the mind."

A careful search of psychiatric literature reveals that there are no recognized authorities or generally accepted medical definitions of mental disease.

The petitioner raises the issue of being classified as a "constitutional psychopath" and nowhere do we find an accepted legal definition of that term nor its application to any cited cases.

The only conclusion of the Petitioner is that the rule is the product of an age of ignorance and superstition, which has grown older but wiser with use and passage of time. We cannot under any stretch of the imagination accept this conclusion as a violation of a constitutional right.

The question of mental disease can be formulated with the authority of law, on legal grounds, in the language of law with a genuine respect for criminal law.

Therefore, the standards set up by this Court which are consistently followed must continue to be the accepted standards and consequently are not a denial of due process of law guaranteed by the Fourteenth Amendment.

III.

Blood-stained clothing taken from petitioner's home were not in violation of the Fourth, Fifth and Fourteenth Amendments.

Respondent urges this Court to deny his petition for a Writ of Certiorari as prayed for in his petition.

Every criminal investigation starts as soon as there is reason to believe a crime has been committed and is subject to prosecution. Investigation may be and in many instances is started by law enforcement officers and/or the County prosecutor. Each has taken an oath to protect the

laws and prosecute all offenders. It further requires co-operation between both agencies to best protect the law abiding citizens.

There is no dispute about the facts that the Petitioner was a possible suspect and there was probable cause for the following reasons:

1. The suspect was a former tenant who possessed a violent temper, who destroyed much property when he vacated the premises where the body of Margaret Van Arsdale was discovered by a neighbor on the morning of July 13, 1963.

2. Petitioner was a known criminal to the investigating authorities.

3. Petitioner had fled from the State of Ohio for the reason that he knew that there was a warrant for his arrest for Assault and Battery.

4. Petitioner had a criminal record and known to be a Peeping Tom and, as the record reveals, had been arrested and convicted for molesting a young girl.

The Fourth Amendment to the Constitution of the United States reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The provisions of the Fourth Amendment are enforceable against the states through the Due Process Clause of the Fourteenth Amendment and all evidence obtained by search and seizures in violation thereof is inadmissible in a state court.[1]

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[1] *Mapp v. Ohio*, 367 U. S. 643, *Kerr v. California*, 374 U. S. 23.

However, if evidence in question is not obtained by search and seizure but is voluntarily handed to the police officers, these Constitutional guarantees are not involved.[1]

"Search" ordinarily implies a quest by an officer of the law or a prying into hidden places for that which is concealed.

"Seizure" contemplates forcible dispossession of the owner.

Guns and clothing voluntarily shown to and given police by Defendant's wife, without coercion and taken away with her consent were not obtained in violation of Constitution of State or United States, were not subject to being returned to Defendant and were admissible in evidence if found relevant and material at trial. U. S. C. A. Const. Amends. 4 & 14.[2]

The arresting officers did have probable cause as clearly stated in *Beck v. State of Ohio*.[3]

> "Rule of probable cause for arrest is a practical, nontechnical conception affording best compromise that has been found for accommodating often opposing interests, and to require more would unduly hamper law enforcement and to allow less would be to leave law-abiding citizens at mercy of officers' whim or caprice."

Court further stated:

> "When constitutional validity of arrest is challenged, it is function of court to determine whether the facts available to officers at moment of arrest would warrant man of reasonable caution in believing that an offense has been committed."

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[1] *State v. Nelson*, 105 N. H. 184, 191, 196; *United States, ex rel. Stacey v. Pate*, 324 F. 2d 934, 935.

[2] *State v. Coolidge Jr.*, 1965, 208 A. T. 2d 322.

[3] *Beck v. Ohio*, 379 U. S. 89, 90 and 91; 85 S. Ct. 223.

"There are limits to the permissible scope of a warrantless search incident to a lawful arrest, but we proceed on the premise that if the arrest itself was lawful, those limits were not exceeded here. See *Harris v. United States,* 331 U. S. 145, 67 S. Ct. 1098; *United States v. Robinowitz,* 339 U. S. 56, 70 S. Ct. 430; cf *Preston v. United States,* 376 U. S. 364, 84 S. Ct. 881. The constitutional validity of the petitioner's arrest. Whether the arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. *Brinegar v. United States,* 338 U. S. 160, 175-176 (93 L. Ed. 1879, 1890, 69 S. Ct. 1302); *Henry v. United States,* 361 U. S. 98, 102 (4 L. Ed. 2d 134, 138, 80 S. Ct. 168). 'The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating * * * often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.' *Brinegar v. United States, supra* (338 U. S. at 176, 93 L. Ed., at 1891)."

"In the *Beck case,* the United States Supreme Court set itself up as a fact finding body and reversed the Ohio Supreme Court on the theory that the evidence of probable cause in that case was insufficient to justify the petitioner's arrest without a warrant."

However, in a more recent Ohio case, *State v. Young,*[1] the question of probable cause was more convincing than in the evidence presented in the *Beck* case.

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[1] *State v. Young,* 8 Ohio App. 2d 51 (1966).

It held as is applicable in this case that the arrest of the Defendant was not based on mere suspicion, nor was it the product of any rash judgment or indiscretion and according to the evidence and the only reasonable inferences which might be drawn therefrom, the arrest was the result of the careful planning and diligence of experienced police officers whose combined knowledge was amply sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense.

This is all the law requires and to require anything more certainly would unduly hamper law enforcement.

Furthermore, the petitioner testified on his own behalf and admitted he was on the premises and tied the decedent in a blanket with an undergarment and pair of panties before he left.

In the *Beck* case, the court further stated on page 92:

"In turning to the question of whether or not the record in the case before us can support a finding of probable cause for the petitioner's arrest, it may be well to repeat what was said by Mr. Justice Clark, speaking for eight members of the Court, in Ker v. California:

'While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—i.e., constitutional—criteria established by this Court have been respected. The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those

rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. See *Jones v. United States*, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960). Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques.' 374 U. S. 23, at 34, 83 S. Ct. 1623, at 1630."

IV.

Petitioner's argument that oral confessions obtained while in custody were admitted into evidence in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments are unfounded.

The Petitioner, as shown by the record, had been involved with the law since he was fourteen years old. He admitted to the authorities, the psychiatrists that he got into trouble while serving in the United State Army; that after being discharged from the Army under Section 208, he continued to break the law. He and his wife testified that he left the State of Ohio because there was a Warrant for his arrest for Assault and Battery.

There had been a robbery at a service station and the arresting officers did not tell this Petitioner deceitfully that he was a suspect in a fictitious gasoline station robbery. A careful examination fails to support the Petitioner's statement on page 48 of the petition herein.

The record and facts fail to further support his further statement that during this entire period of detention, Petitioner was held incommunicado, questioned at length by interrogating officers operating in relays for as long as five (5) hours at a time.

Respondent challenges this false and unsupported statement which also appears on page 48 of his petition.

He was advised of his rights and the Ohio Supreme Court so stated[1] in syllabus No. 1, which is as follows:

> "Where, during the investigation of a crime, a person not yet charged with the commission of such crime is informed prior to being interrogated by a deputy sheriff and an assistant prosecutor that he is not required to make any statement, and that any statement which he might make may be used against him, and where he has not requested that counsel be provided, such person has not been denied the assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution."

The Petitioner was the only suspect and was not pressured by any techniques.

There is no law that prevents a criminal to re-enact a crime. The record shows that he voluntarily agreed to take the police officers and show them the exact route he followed in his car and by foot. He demonstrated the exact location of his car which he drove about one-fourth of a mile off the highway into a plowed field and pointed the route he took to the decedent's home.

The Petitioner admits he made a full confession in the afternoon of July 15, 1963.

That evening the Petitioner was brought into court at which time an affidavit was prepared, filed and brought before the Elyria Municipal Court and he was charged with Murder in the First Degree.

The court continued the arraignment to the following morning to allow Petitioner to consult with counsel, who, the next morning waived preliminary hearing and the

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[1] *State v. Woodards*, 6 Ohio St. 2d 14 (1966).

Petitioner was bound over to the next session of the Grand Jury as provided for under Ohio Revised Code.

Thereafter, Petitioner selected two other counsel to represent him at the trial before the Court of Appeals and the Ohio Supreme Court and is now represented by three other able counselors before the United States Supreme Court.

This Respondent agrees with the Petitioner that the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort,[1] and can be made only by an examination of all the attendant circumstances.

In the instant case, we have a twenty-five year old married man, who has been involved with the law on many occasions, been represented by counsel, served in the United States Army and with an I.Q. of 85 and 91.

Petitioner's averment that he was held incommunicado is not substantiated by the record.

His contention that since his confession was obtained by in custody interrogation during a period of detention resulting from failure of the arresting officers to bring him before a magistrate without necessary delay, such illegal detention taints the confession to such an extent that it must be suppressed. This man was not charged with First Degree Murder until 6:00 p.m. on July 15, 1966, the very same day that he admitted the crime and re-enacted the scene of the crime. This was less than four hours after his admission.

There was no delay in arraignment. The petitioner was not charged with Murder until after the facts admitted were checked and verified by the law enforcement officers and the County Prosecutor's Office.

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[1] *Wilson v. United States,* 162 U. S. 613, 623.

Therefore, there is no basis for Petitioner's argument that McNabb-Mallory rule should apply and also there is absolutely no supported evidence of any valuation of the due process clause of the Fourteenth Amendment.

V.

Petitioner has waived his Federal constitutional rights by his own conduct.

He took the stand in his own defense, had ample opportunity to rebut any and all evidence introduced. He was confronted with all the State's witnesses; therefore, how can the Petitioner in good conscience state on page 63 of his petition, "The after-the-fact justification of a tainted trial by the Ohio Supreme Court will not bear close analysis."

CONCLUSION.

We agree with Petitioner that this was a brutal and senseless death.

There is no cry for vengeance of a frightened community.

The Petitioner's exaggerations about the home being ransacked are conclusions of someone's imagination, who had absolutely no facts to warrant such false statements.

There was no coerced confession, no illegally obtained evidence.

The Petitioner brought in as his own witness a prominent psychiatrist to testify that he was sane, that he knew right from wrong.

The laws of the State of Ohio and the laws of the United States were established for the protection of society, binding upon all persons and the guilty should be punished accordingly.

For all the reasons given throughout this reply, the Petitioner should be denied a writ of certiorari.

Respectfully submitted,

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